

**UNIVERSITY OF BELGRADE
FACULTY OF LAW**



Ana M. Zdravković

ABSOLUTE HUMAN RIGHTS

Doctoral Dissertation

Belgrade, 2025.

**UNIVERZITET U BEOGRADU
PRAVNI FAKULTET**



Ana M. Zdravković

APSOLUTNA LJUDSKA PRAVA

Doktorska disertacija

Beograd, 2025.

PODACI O MENTORU I ČLANOVIMA KOMISIJE ZA ODBRANU

Mentorka:

- Prof. dr Bojana Čučković, vanredna profesorka Pravnog fakulteta Univerziteta u Beogradu

Članovi Komisije za ocenu doktorske disertacije:

- Prof. dr Ivana Krstić, redovna profesorka Pravnog fakulteta Univerziteta u Beogradu
- Prof. dr Miodrag Jovanović, redovni profesor Pravnog fakulteta Univerziteta u Beogradu
- Dr Milica V. Matijević, viša naučna saradnica Instituta za uporedno pravo

Datum odbrane doktorske disertacije: _____

ABSOLUTE HUMAN RIGHTS

Summary

References to absolute human rights can be found in both scholarly writings and the case law of international monitoring bodies, yet the concept itself is still not clearly defined, hence remains inconsistently applied and marked by legal uncertainty and uneven protection across legal systems. Therefore, this dissertation focuses on the concept within the framework of international human rights law, in order to elucidate its meaning and practical implications.

The research pursues three main objectives. First, it builds an innovative human rights restrictions taxonomy, which is necessary for understanding and defining absolute, unconditional rights.

Second, precise conceptual definition of absolute human rights is offered, distinguishing them from related notions. The doctrinal positions and relevant case-law of international monitoring bodies are critically assessed to develop a framework that is both theoretically sound and operational in practice, followed by a list of rights that can qualify as absolute.

Third, the thesis situates absolute rights within the broader hierarchy of international norms, while also exploring their relationship with neighbouring concepts, such as non-derogable rights, *jus cogens* norms and *erga omnes* obligations, and their role in the constitutionalisation of international law. Analysis of their interaction reveals whether and when absolute human rights may be considered part of the peremptory core of international law.

Methodologically, this research draws primary on conceptual analysis, supported by complementary approaches, such as doctrinal interpretation and comparative analysis. Historical and philosophical perspectives are also included, as they have the potential to inform the conceptual framework. Finally, the account offered is based on a detailed examination of the text of relevant international treaties, their *travaux préparatoires*, and accompanying case-law.

The significance of this study may be in its potential to bring greater conceptual clarity to a term that is widely used but rarely defined, thereby encouraging more consistent judicial reasoning and stronger protection of core human rights, which should serve as a safeguard against the erosion of human dignity in the most challenging circumstances.

Key Words: – *Absolute Human Rights*. – *Human Rights Restrictions*. – *Human Rights Limitations*. – *Non-Derogable Rights*. – *European Convention on Human Rights*. – *International Covenant on Civil and Political Rights*. – *American Convention on Human Rights*. – *Jus Cogens Norms*.

Scientific Field: Law

Scientific Subfield: International Public Law

APSOLUTNA LJUDSKA PRAVA

Sažetak

Pojam apsolutnih ljudskih prava može se pronaći kako u akademskim radovima, tako i praksi međunarodnih tela. Međutim, sadržaj ovog koncepta ostao je nedovoljno određen, te on nedosledno primenjivan. Značenje ovog pojma se često podrazumeva umesto da bude jasno artikulirano, što dovodi do pravne nesigurnosti i neujednačene zaštite u različitim pravnim sistemima. Stoga je fokus ove disertacije je pojašnjenje njegove sadržine i praktičnih implikacija.

Tri su osnovna cilja ovog istraživanja. Pre svega, analiza predlaže novu sistematizaciju ograničenja ljudskih prava, čije je definisanje i razumevanje neophodno za definisanje apsolutnih prava.

Zatim, u radu je koncipirana precizna definicija pojma apsolutnih ljudskih prava, koja bi trebalo da omogući njegovo jasno razlikovanje od srodnih koncepata. Kritičko razmatranje doktrinarnih stanovišta i detaljno istraživanje relevantne prakse međunarodnih sudova i kvazisudskih tela sprovedeni su u cilju izgradnje teorijski utemeljenog okvira, koji je istovremeno primenljiv u praksi i praćen listom prava koja se, u ovom momentu razvoja međunarodnog prava, mogu smatrati apsolutnim.

Naposletku, disertacija teži da pozicionira apsolutna prava u širi hijerarhijski okvir međunarodnopravnih normi, te ispituje njihov odnos sa srodnim pojmovima, poput nederogabilnih prava, *jus cogens* normi i *erga omnes* obaveza, kao i njihovu ulogu u konstitucionalizaciji međunarodnopravnog poretka. Analiza međusobne povezanosti i interakcije ovih koncepata otkriva i da li se i kada apsolutna ljudska prava mogu smatrati peremptornim normama međunarodnog prava.

Metodologija istraživanja se oslanja na konceptualnu analizu, potpomognutu komplementarnim metodama, poput doktrinarnog tumačenja i uporednopravne analize. Istorijske i filozofske perspektive obogatile su ponuđenu konceptualizaciju, dok detaljno istraživanje normi međunarodnih ugovora, *travaux préparatoires* i sudske prakse čine njenu osnovu.

Značaj ovog istraživanja može se ogledati u njegovom nastojanju da unese pojmovnu jasnoću u termin koji se često koristi, a retko definiše, i time pomogne doslednijem sudijskom rasuđivanju, izradi uverljivijih obrazloženja presuda, a u krajnjoj liniji i boljoj zaštiti osnovnih ljudskih prava, koja bi trebalo da služe kao štit ljudskom dostojanstvu i u najizazovnijim okolnostima.

Ključne reči: – *Apsolutna ljudska prava.* – *Ograničenja ljudskih prava.* – *Fakultativna ograničenja ljudskih prava.* – *Nederogabilna prava.* – *Evropska konvencija o ljudskim pravima.* – *Međunarodni pakt o građanskim i političkim pravima.* – *Američka konvencija o ljudskim pravima.* – *Jus Cogens norme.*

Naučna oblast: Pravo

Uža naučna oblast: Međunarodno javno pravo

ACKNOWLEDGMENTS

As I complete the final revisions of this thesis, I realise that this moment is more emotional than I expected. The topic has been with me for more than a few years now, and our relationship has been a dynamic one. It has inspired me, pushed me to learn a whole range of new things (some of which I never imagined I would ever need), and opened many doors for me and my career. At times, it has also driven me - and my closest friends and colleagues - to the very margins of madness.

Before all else, I am profoundly grateful to my supervisor, Prof. Bojana Čučković, for endless patience and remarkable support during the process of writing this thesis, as her advice, guidance and encouragement, have shaped not only this thesis, but also me as a researcher and a person. I am particularly grateful for the freedom I was given to develop my own ideas, while still receiving critical insights when they were needed. Our cooperation dates back to 2015, when I was still an undergraduate student, unaware of the light and darkness that lay ahead. I am quite certain that, without her gentle but persistent encouragement, I would never have had embarked on a PhD in the first place, since she was the first to recognise my inclination towards research and to suggest that this might actually be something I would enjoy doing, and, as it turns out, she was absolutely right. I feel truly privileged to have spent a decade now learning from someone whose intellectual curiosity is matched only by her kindness, and I can only hope that at least a small part of her knowledge, integrity and generosity has rubbed off on me.

A lot has happened while this thesis was in the process of the making. Not only have we endured many professional and personal hardships, but we have also received numerous blessings along the way, including the opportunity to participate in the implementation of the project “Advancing Cooperation on the Foundations of Law” (HORIZON-WIDERA-2021-ACCESS-03-01), which was implemented by the Faculty of Law University of Belgrade and funded by the European Union. This thesis is the contribution to that project, which has brought me extensive experience and opportunities, as it enabled me to conduct several research stays at the Tarello Institute for Legal Philosophy in Genoa and a Spring Semester 2025 research stay at Surrey Centre for Law and Philosophy in London, where I was able to broaden my academic horizons, meet amazing colleagues from the field, and gather the materials necessary for this work.

However, I will remain forever indebted to Prof. Miodrag Jovanović, Prof. Goran Dajović and Prof. Bojan Spaić, who stood by my side before, during and after the project. They kept cheering for me, pushed me to work harder when I thought it was impossible and provided me with countless intellectually stimulating talks (an uninformed observer might even call them quarrels). Whatever this thesis gets right with regard to the philosophy of law is due entirely to them. As someone who comes from the background in international law, it was at times quite challenging to grasp all the philosophical dimensions of the topic, but they made it truly fun, and I continue to find inspiration in their dedication to the field and work ethic.

The project offered me number of occasions to talk about my topic and to gather feedback from colleagues at partner institutions, which was crucial for shaping and completing this thesis. To my relief, many of these moments turned out to be not only intellectually productive, but also genuinely entertaining and I am grateful to all those who

took the time to listen to my arguments and offer me valuable comments, although they are too many to name here. However, I owe special thanks to Prof. Alessio Sardo, who accepted to be my mentor during the project and to Prof. David Duarte and Prof. Pedro Moniz Lopes, who did their best to convince me that there are no absolute rights, with the aim of making my account sharper.

During the project, certain parts of this research have previously been published to gather valuable feedback, and references to those papers are included throughout the thesis.

With regard to the topic itself, I am immensely grateful to Prof. Ivana Krstić, who was the first to hear about it and supported it from the very first moment with great enthusiasm that encouraged me and which I remembered in the moments of doubt and weakness.

Once I decided to embark on this topic, I began by reading the work of (a few) scholars who had already written about it and among them, I contacted Prof. Natasa Mavronicola, who responded with remarkable generosity, offering nothing but sincere support and encouragement, and making me feel that there was also room for my voice in this topic. For that, I am immensely grateful and I can only hope that other early-career researchers will have at least a fraction of the positive experience that I have been fortunate enough to have.

During my doctoral studies, I began working at the Institute of Comparative Law, where Milica V. Matijević was appointed as my mentor (by the decision of the Scientific Council of the Institute on December 26, 2022). Owing to her, I continue to find meaning in this profession on a daily basis. Apart from publishing with me a number of papers, from which I benefited greatly, she has offered me countless insightful comments on this thesis, each of which has made the account stronger, and I still find myself wondering what I have done to deserve such a kind-hearted and inspiring colleague and friend. My thanks goes to other colleagues at the Institute as well, who share a genuine commitment to academic life and to the values it represents.

It should be emphasised that for all that is valuable in this thesis I am indebted to those who have supported me, while any remaining errors and shortcomings are entirely my own responsibility.

As every academic quickly learns, ideas may be free, but research is not. This thesis would not have been possible without financial support of the Ministry of Education, Science and Technological Development of the Republic of Serbia, the grant received from the Sylff Association and the scholarship from the Konrad Adenauer Stiftung, and I am grateful to all of them for seeing potential in me.

I also wish to express my heartfelt thanks to Aleksandra Pravdić for her patience and support, for the endlessly long conversations about law that have inspired me for many years, and for her willingness to learn more about absolute rights than she (probably) ever wanted to know.

The same goes to my partner, Đorđe Spasić, who stood proudly in my corner, rooted for me and held me up, especially when everything felt overwhelming.

Finally, I owe more than I can ever say to my parents. Their unconditional love, patience, and support in every possible way have carried me through these years. They have not only stood behind my choices, but have also been my closest friends, and they are the ones who have made me the person I am today. This thesis is, in the deepest sense, dedicated to them, with all my love and gratitude.

IZJAVE ZAHVALNOSTI

Na samom kraju rada na ovoj disertaciji, shvatam da mi njen završetak pada mnogo teže nego što sam očekivala. Tema disertacije prati me već godinama, a naš odnos je bio prilično dinamičan. Inspirisala me je, podsticala da izučavam niz novih tema (od kojih neke nikada nisam mogla ni da zamislim da će mi zatrebati) i otvorila mi je mnoga vrata u akademskom i profesionalnom smislu. Povremeno je, međutim, i mene, ali i moje najbliže prijatelje i kolege – dovodila do samih granica strpljenja.

Najpre, neizmerno sam zahvalna svojoj mentorki, prof. dr Bojani Čučković, na beskrajnom strpljenju i izuzetnoj podršci tokom izrade ove disertacije. Njeni saveti, smernice i ohrabrenje oblikovali su ne samo ovu disertaciju, već i mene kao istraživačicu i kao ličnost. Posebno sam zahvalna na slobodi koju mi je pružila da razvijam sopstvene ideje, uz to što sam u ključnim trenucima uvek dobijala potrebne kritičke uvide. Naša saradnja datira još od 2015. godine, kada sam još uvek bila studentkinja osnovnih studija, potpuno nesvesna izazova koji su me tek čekali. Uverena sam da se, bez njenog odmerenog, ali istrajnog podsticaja, nikada ne bih odlučila da upišem doktorske studije. Ona je bila ta koja je prepoznala moju sklonost ka istraživačkom radu i sugerisala mi da bi to mogao biti poziv u kome bih zaista uživala – i ispostavilo se da je bila potpuno u pravu. Izuzetno sam srećna što sam proteklu deceniju provela učeći od nekoga čija se intelektualna radoznalost može meriti samo njenom ljudskom toplinom. Ostaje mi samo da se nadam da je, na ovom putu, bar deo njenog znanja, integriteta i velikodušnosti „prešao“ i na mene.

Mnogo toga se desilo u periodu dok je ova disertacija nastajala. Ne samo da smo prošle kroz brojne profesionalne i lične izazove, već je na ovom putu bilo i mnogo lepih događaja, među kojima posebno izdvajam priliku da učestvujem u realizaciji projekta „Advancing Cooperation on the Foundations of Law“ (HORIZON-WIDERA-2021-ACCESS-03-01), koji je sproveo Pravni fakultet Univerziteta u Beogradu, uz finansijsku podršku Evropske unije. Ova disertacija predstavlja doprinos tom projektu, koji mi je omogućio dragocena iskustva i prilike, a između ostalog, i više istraživačkih boravaka na Tarello institutu za pravnu filozofiju u Đenovi, kao i istraživački boravak tokom prolećnog semestra 2025. godine u Centru za pravo i filozofiju Univerziteta Sarej u Londonu, gde sam imala priliku da proširim svoje znanje, upoznam sjajne kolege iz ove oblasti i prikupim građu neophodnu za izradu disertacije.

Zauvek ću ostati neizmerno zahvalna prof. Miodragu Jovanoviću, prof. Goranu Dajoviću i prof. Bojanu Spaiću, koji su bili uz mene pre, tokom i nakon projekta. Verovali su u mene, podsticali me i bodrili da se trudim više i onda kada sam mislila da je to nemoguće i omogućili mi bezbroj intelektualno podsticajnih i inspirišućih razgovora (koje bi neupućeni posmatrač možda nazvao čak i svađama). Za sve ono što ova disertacija ispravno sadrži u pogledu filozofije prava, zaslužni su upravo oni. Kao neko ko dolazi iz oblasti međunarodnog prava, često sam se suočavala sa izazovima u razumevanju svih filozofskih dimenzija teme, ali su oni uspeali da učine taj proces istinski zabavnim, a ja i dalje nastavljam da pronalazim inspiraciju u njihovoj posvećenosti ovoj disciplini i radnoj etici.

Zahvaljujući projektu, imala sam brojne prilike da predstavim ovu temu i prikupim komentare kolega sa partnerskih institucija, što je bilo veoma značajno za oblikovanje i dovršavanje ove disertacije. Na moje veliko olakšanje, mnogi od tih trenutaka pokazali su

se ne samo intelektualno produktivnim, već i iskreno zabavnim, i zahvalna sam svima koji su odvojili vreme da saslušaju moje argumente i pruže mi dragocene komentare, iako ih je mnogo da bih ih sve ovde nabrojala. Ipak, dugujem posebnu zahvalnost prof. Alesiju Sardu, koji je pristao da mi bude mentor tokom trajanja projekta, kao i prof. Davidu Duarteu i prof. Pedru Moniz Lopezu, koji su uložili izuzetan trud da me ubede kako apsolutna prava ne postoje, a u cilju podsticaja da svoj konceptualni okvir učinim oštrijim.

Tokom trajanja projekta pojedini delovi ovog istraživanja objavljeni su u cilju prikupljanja recenzija i komentara, a reference na te radove nalaze se u relevantnim delovima disertacije.

Kada je reč o samoj temi, neizmerno sam zahvalna prof. Ivani Krstić, kojoj sam je prvo predstavila i koja ju je podržala od samog početka, sa iskrenim entuzijazmom koji me je ohrabrio i na koji sam se vraćala u trenucima sumnje i slabosti.

Nakon što sam odlučila da se upustim u ovu temu, počela sam istraživanjem radova (nekolicine) autora koji su se njome već bavili. Među njima, stupila sam u kontakt sa prof. Natašom Mavronicolom, koja je na moje predstavljanje odgovorila izuzetno velikodušno, nudeći mi samo iskrenu podršku i ohrabrenje, čineći da se osećam kao da u ovoj oblasti ima mesta i za moj glas. Zbog toga sam joj iskreno zahvalna i ostaje mi da se nadam da će i drugi istraživači na početku karijere imati makar delić pozitivnog iskustva koje sam ja imala sreće da steknem.

Tokom doktorskih studija zaposlila sam se u Institutu za uporedno pravo, gde mi je za mentorku određena Milica V. Matijević (na sednici Naučnog veća Instituta od 26.12.2022. godine), na čemu sam neizmerno zahvalna i zahvaljujući kojoj svakodnevno iznova pronalazim smisao u ovom pozivu. Osim što je sa mnom objavila više radova, prilikom čije izrade sam mnogo naučila, tokom izrade disertacije mi je kontinuirano slala komentare, koji su doprineli tome da argumentacija u tezi bude snažnija, koherentnija i stilski unapređenja. I dalje se često pitam čime sam zaslužila tako velikodušnu i inspirativnu koleginicu za mentorku, a usudiću se, i prijateljicu. Zahvalnost dugujem i drugim koleginicama i kolegama iz Instituta, koji sa mnom dele iskrenu posvećenost akademskom radu i vrednostima koje on nosi.

Za sve ono što u ovoj disertaciji vredi zahvalna sam svima koji su me podržavali, dok su eventualni propusti i nedostaci isključivo moja odgovornost.

Kao što svaki naučnik brzo shvati, ideje možda jesu besplatne, ali istraživanje nije. U tom smislu, ova disertacija ne bi bila moguća bez finansijske podrške Ministarstva prosvete, nauke i tehnološkog razvoja Republike Srbije, granta koji sam dobila od Tokio fonda (the Sylff Association) i stipendije fondacije Konrad Adenauer, i zahvalna sam im što su u meni prepoznali potencijal.

Od srca se zahvaljujem i Aleksandri Pravdić, na strpljenju i podršci, na predugim razgovorima o pravu, koji me inspirišu već dugi niz godina, ali i na spremnosti da o apsolutnim pravima sazna više nego što je (verovatno) ikada želela.

Jednaku zahvalnost dugujem i svom partneru, Đorđu Spasiću, koji je ponosno stajao uz mene i navijao za mene, pogotovo u trenucima kada je bilo najteže.

Na kraju, dugujem više nego što ikada mogu da izgovorim svojim roditeljima. Njihova безусловna ljubav, strpljenje i podrška nosili su me kroz sve ove godine. Ne samo da su stajali iza mojih izbora, već su mi bili i najbliži prijatelji, i oblikovali me u osobu kakva sam danas. Ova disertacija je posvećena njima, uz svu moju ljubav i zahvalnost.

TABLE OF CONTENTS

INTRODUCTORY REMARKS	1
I THEORETICAL VIEWS ON ABSOLUTE HUMAN RIGHTS.....	4
1. SETTING THE STAGE	4
2. ABSOLUTE HUMAN RIGHTS PRIOR TO THE GLOBAL WAR ON TERRORISM.....	5
3. ABSOLUTE HUMAN RIGHTS AFTER THE GLOBAL WAR ON TERRORISM.....	19
II ABSOLUTE HUMAN RIGHTS AND HUMAN RIGHTS RESTRICTIONS - TWO SIDES OF THE SAME COIN	35
1. HUMAN RIGHTS RESTRICTIONS — ONE NOTION TO RULE THEM ALL.....	35
2. DEROGATIONS OF HUMAN RIGHTS.....	46
2.1. <i>Decoding Derogations in International Law: A Theoretical Exploration</i>	47
2.2. <i>Derogation Clauses – An Easy Way Out?</i>	54
2.2.1. The Making-Of Derogation Clause	55
2.2.2. Derogation Done Right – Criteria for Imposing Lawful Measures	61
2.2.3. Non-derogable Rights	76
2.2.4. The Silent Covenant: ICESCR and the Absence of the Derogation Clause	93
2.3. <i>What Could Be Next for This Legal Escape Room?</i>	96
3. LIMITATIONS OF HUMAN RIGHTS	98
3.1. <i>The ECHR Approach to Limited Rights</i>	99
3.2. <i>The ICCPR Framework of Limited Rights</i>	105
3.2.1. Legitimate Aims – Underdeterminate Concepts	107
3.3. <i>The ACHR Perspective on Limited Rights</i>	109
3.4. <i>An Exceptional Case: Limited Rights in the African System</i>	110
3.5. <i>Crisis or Continuity? Drawing the Line Between Derogations and Limitations</i>	112
4. IMPLICIT LIMITATIONS OF HUMAN RIGHTS.....	114
5. PINPOINT EXCEPTIONS OF HUMAN RIGHTS.....	117
III FINDING ABSOLUTE HUMAN RIGHTS IN THE NORMATIVE FRAMEWORK AND CASE LAW OF THE INTERNATIONAL COURTS AND QUASI-JUDICIAL BODIES.....	125
1. THE RIGHT TO LIFE	125
2. THE PROHIBITION ON THE DEATH PENALTY	137
3. THE PROHIBITION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	143
3.1. <i>The Prohibition of Ill-Treatment in the ECHR – “Absolutest” of Them All</i>	144
3.2. <i>The Prohibition of Ill-Treatment under the ICCPR – A Universal Commitment to Absoluteness</i>	159
3.3. <i>The Prohibition of Ill-Treatment within the ACHR System – Not Only Absolute but Also Jus Cogens</i>	163
4. NON-REFOULEMENT	165
5. THE PROHIBITION OF SLAVERY AND HUMAN TRAFFICKING	175
6. THE PROHIBITION ON EX POST FACTO LAWS	181
7. NE BIS IN IDEM.....	187
8. THE PROHIBITION OF IMPRISONMENT FOR INABILITY TO FULFIL A CONTRACTUAL OBLIGATION.....	192

9. THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION	194
10. THE RIGHT TO JURIDICAL PERSONALITY.....	205
11. RIGHTS OF THE FAMILY.....	208
12. THE RIGHT TO A NAME	210
13. RIGHTS OF THE CHILD	211
14. THE RIGHT TO NATIONALITY.....	212
15. THE RIGHT TO PARTICIPATE IN GOVERNMENT	213
16. JUDICIAL GUARANTEES ESSENTIAL FOR THE PROTECTION OF NON-DEROGABLE RIGHTS ..	215
17. OTHER RIGHTS AS POTENTIAL NOMINEES FOR AN ABSOLUTE STATUS.....	219
18. CONCLUDING REMARKS.....	224
IV LEGAL NATURE OF ABSOLUTE HUMAN RIGHTS.....	226
1. THE DEBATE OF THE DECADE	226
2. ARE THERE ANY ABSOLUTE HUMAN RIGHTS?	245
3. WHAT ARE ABSOLUTE HUMAN RIGHTS SAID TO BE?.....	246
4. WHAT ARE ABSOLUTE HUMAN RIGHTS?	252
5. WHICH RIGHTS ARE ABSOLUTE HUMAN RIGHTS?	265
V ABSOLUTE HUMAN RIGHTS AS A CONTRIBUTION TO THE CONSTITUTIONALISATION OF INTERNATIONAL LAW	271
1. DRAWING A LINE IN THE SAND – UNDERSTANDING <i>JUS COGENS</i>	271
2. <i>JUS COGENS</i> V. ABSOLUTE HUMAN RIGHTS.....	274
3. REGIONAL <i>JUS COGENS</i> V. ABSOLUTE HUMAN RIGHTS	278
4. NORMATIVE HIERARCHY IN INTERNATIONAL LAW - MOVING BEYOND DENIAL	279
CONCLUSION: ABSOLUTE HUMAN RIGHTS ON THE BRIDGE BETWEEN PHILOSOPHY AND LAW	283
BIBLIOGRAPHY.....	289
ANNEXES FOR THE UNIVERSITY OF BELGRADE.....	321

ABBREVIATIONS

ACHPR – African Charter on Human and Peoples’ Rights

ACHR – American Convention on Human Rights

ACommHR – African Commission on Human and Peoples’ Rights

ARSIWA – Draft Articles on Responsibility of States for Internationally Wrongful Acts

CAT – United Nations Committee against Torture

CESCR – Committee on Economic, Social and Cultural Rights

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECommHR – European Commission of Human Rights

ECtHR – European Court of Human Rights

HRC – Human Rights Committee

IACCommHR – Inter-American Commission on Human Rights

IACtHR – Inter-American Court on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

IESCR – International Covenant on Economic, Social and Cultural Rights

ILC – International Law Commission

UN – United Nations

UNCAT – United Nations Convention Against Torture

UNHCR – United Nations High Commissioner for Refugees

VCLT – Vienna Convention on the Law of Treaties

INTRODUCTORY REMARKS

References to absolute human rights occur sporadically in international human rights law. Predominantly present in the jurisprudence of the ECtHR, which has long described the prohibition of torture and ill-treatment as absolute, the notion appears not only in textbooks and doctrinal works, but also in the dicta of other international courts, quasi-judicial and UN bodies, often as if its meaning were obvious and self-evident. So, despite occasional invocation, absoluteness of human rights is seldom defined with precision, and even more rarely applied with doctrinal consistency. While courts classify certain rights as absolute, they often abstain from clarifying what the label entails, whereas scholars offer competing definitions, with some even denying their existence. Moreover, the field of international human rights law relies heavily on overlapping notions, such as non-derogable rights, absolute rights, *erga omnes* obligations, and *jus cogens*, that are often conflated in both theory and practice. If absoluteness is to (become or) remain a meaningful category, it must be disentangled from these neighbours and mapped within the broader architecture of normative framework of international law.

Therefore, lack of a general account of absoluteness leads to a doctrinal confusion, followed by a risk of inconsistent reasoning and a persistent gap between the rhetorical force of absoluteness and its practical consequences in adjudication.

The idea behind this study is to address that gap, by offering a comprehensive framework regarding absolute human rights. In order to do that, it will firstly present the main philosophical approaches to absoluteness and acknowledge the differences in perceiving this category of rights before and after 9/11. As it is in times of crisis that a (legal) system shows what it is really made of, the post-9/11 period brought a wave of emergency measures and renewed attempts to relativise absolute protections, and these voices continued to appear in recent events regarding the COVID-19 pandemic. In such conditions, clarity itself becomes a safeguard, as the more exact the account on which rights are absolute and why, the more resilient those rights are likely to be when pressure mounts. Hence, returning to philosophical views and debates was not undertaken with the aim to offer innovative solutions for the future moral debates, but to extract arguments and positions that may possibly be relevant to the legal doctrine. The study prioritises law as applied and the operative consequences of calling a right absolute, rather than comprehensive moral theorising about absolutes and deontology in general. Nevertheless, although the thesis firmly opposes conflating moral and legal arguments, it must be accepted that moral considerations inform and, to some extent, shape legal reasoning, which is why it offers valuable insights for legal analysis and deserves its place in this work.

After that, it is necessary to address the “other side of the coin”, that is, human rights restrictions, because the story about absolute human rights is actually the story about how human rights can(not) be restricted. Therefore, the thesis will build the innovative restrictions taxonomy in detail, consisting of derogations, limitations, implicit limitations and pinpoint exceptions, the term offered exclusively by this thesis. The following chapter will then try to find absolute rights in the jurisprudence of different international adjudicating bodies, focusing on those treaties that contain derogation clause - the ECHR, ICCPR, and ACHR - and analysing the way in which monitoring organs have utilised the term “absolute” in their case-law. The African system, the ICESCR and the EU Charter

appear wherever they clarify a restriction device or illustrate a relevant conceptual point, but they are not analysed exhaustively, primarily because they contain no derogation clause. The research is focused on non-derogable rights because intuitively, those are the classic candidates for an absolute status, but there are also some additional rights that will be taken into account for their fundamental significance, apparent unconditional framing, and potential absoluteness.

Against this background, the thesis will proceed to achieve its aim, that is, to articulate the legal nature of absolute human rights, by offering a precise and workable definition of absolute rights within international human rights law, identifying rights that meet that definition and placing them into the broader hierarchy of international norms, including testing their contribution to the constitutionalisation of international law.

While such variation is not methodologically ideal, the chapters of this thesis will markedly differ in their length. This is a natural consequence of the substantive disparities among the examined topics, which range from an extensive analysis of more than 250 decisions rendered by various international bodies to a concise conceptual analysis.

In any case, since the thesis strives to offer conceptual contribution by drawing on both doctrinal and empirical findings, it will use a mixed methodology.

Naturally, the central method is conceptual analysis, as the primary goal of the thesis is to clarify the concept of absolute human rights, by defining it via its essential features and argumentatively distinguishing it from neighbouring notions. By doing so, the analysis inevitably offers a conceptualisation of those other inter-linked concepts, which is an added contribution to the analytical precision. In accordance with the stance that an analysis dealing with law as its subject must attempt to encompass as many of the “self-evident” truths about the concept at hand as possible,¹ this thesis relies on complementary methods and insights in order to collect relevant materials and capture the analysed notion.

For instance, to understand how absolutism in rights discourse evolved and how courts came to use the term, the study uses historical lens to trace key philosophical approaches and preparatory works regarding the human rights treaties to understand both the origins of the absoluteness idea in human rights law and some specific angles, such as what the non-derogability was intended to signify.

Furthermore, it compares positions across the three major treaty systems, namely ECHR, ICCPR and ACHR, representing different regions and legal traditions, thereby utilising comparative analysis. Where the same right is treated differently, the comparison helps to illuminate underlying assumptions and institutional logics.

Though usual methods of legal interpretation are used with regard to the treaty texts, especially their derogation and limitation clauses, and accompanying case-law, particular weight is given to teleological interpretation where the object and purpose of a right clarifies whether restrictions or exceptions were contemplated. Since the thesis examines how courts apply (or avoid) proportionality when a right is labelled “absolute”, and how they handle conflicts of norms and issues related to their scope, some of the conclusions about the meaning and effects of absoluteness are derived inductively from recurring patterns in the case law.

¹ Goran Dajović, “Pravna nauka i konceptualna analiza,” in *Challenges and Perspectives of the Development of Legal Systems in 21st Century*, eds. Igor Milinković and Bojan Vlaški (Banja Luka: Faculty of Law, University of Banja Luka, 2022), 83.

Therefore, the combination of different approaches to the topic allows the thesis to move from philosophical debates to doctrinal clarity and comparative robustness, and finally to arrive to systemic placement.

In sum, this thesis is both an inquiry into the meaning and a contribution towards a greater doctrinal precision. Defining what absolute truly entails in human rights law, identifying which rights fit that definition and situating them within the normative hierarchy of international law provide a coherent framework that may withstand the pressures of potential future crises and strengthen conceptual articulation, with the aim of adopting a more principled and consistent application of this contested yet vital category.

I THEORETICAL VIEWS ON ABSOLUTE HUMAN RIGHTS*

“Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature – that baby beating its breast with its fist, for instance – and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions?”

- Ivan Karamazov (Fyodor Dostoevsky, *The Brothers Karamazov*, 1957)

1. Setting the Stage

Given that this introductory chapter will focus on philosophical views on absolute (human) rights, a caveat regarding the link between legal and moral human rights seems inevitable. Namely, most of the scholars that dealt with the topic of absoluteness from a philosophical point of view, and which will be the main actors of the following pages contemplated moral human rights. That said, it is pertinent to note that there is actually no universally accepted explanation of the relationship between human rights as moral rights and human rights as legal rights.² This is evident from the recent contribution of Başak Çalı, who recognised four different approaches towards the relationship.³

To begin with, some argued that these are distinct and separate categories, which is the view that can be traced back to the more general positivist position on law and morality being two separate domains of inquiry, regardless of the possible overlaps in the objects that they study.⁴ This “no relationship view”, as Çalı labelled it, insists that the focal point of moral human rights is the domain of morality, which is completely independent from the legal practice of human rights.⁵ Therefore, it is said that, from the perspective of positivist lawyers, legal human rights find their basis in law and do not need any other grounds or justifications apart from their conventional foundations.⁶

* Parts of this chapter were published as a paper in Ana Zdravković, “How It All Began - Exploring The Theoretical Conceptualisations of Absolute Rights”, *Revista de Estudios Judiciales*, no. 8 (2024): 5-47.

² Neither is there a common agreement on this differentiation itself in the literature. For instance, Siegfried van Duffel distinguished human rights, as those that are inherent and derive simply from the fact of being human, from legal and conventional rights, that depend on conventions and institutional agreements and moral rights, that arise due to special relationships, like the right to fulfilment of a promise, Siegfried van Duffel, “Moral Philosophy”, in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford University Press, 2013), 33-34.

³ Başak Çalı, “International Legal Human Rights and Moral Human Rights - Friends or a Foes?”, in *Human Rights in the 21st Century*, eds. Tibor Varadi, Miodrag Jovanovic (Eleven International Publishing and the Serbian Academy of Sciences and Arts, 2020), 13-25.

⁴ *Ibid*, 17.

⁵ *Ibid*.

⁶ *Ibid*. See also Carlo Invernizzi-Accetti, “Reconciling Legal Positivism and Human Rights: Hans Kelsen's Argument from Relativism”, *Journal of Human Rights* 17, No. 2 (2018): 215-228.

On the other hand, within “morality-dominant relationship view” it is considered that legal human rights must refer somehow to the moral human rights.⁷ Even though there are various perspectives on the exact nature of this reference, one of them is especially worth mentioning. According to the so-called “mirroring view”, which was widely criticised by Allen Buchanan, every legal human right must directly correspond to a pre-existing moral right, otherwise it may not be viewed as real.⁸

Another group of ideas regarding the matter, which is marked as “law-regarding relationship view”, can be boiled down to the stance that moral human rights are practice-dependent, hence the practice of international human rights must be taken into account in order to understand moral human rights.⁹

Finally, the idea that the relationship in question is a dynamic one and that human rights law can even be conceived as a generator of moral human rights is the main point of “law’s internal morality view”.¹⁰ Supporting this one was Samantha Besson when she explained that a moral human right need not pre-exist the legal human right, as well as that our moral and legal reasons may arise at the same time in given circumstances, and the law may create a moral human right through a legal human right.¹¹

Taking everything said under consideration, it becomes evident that scholarship has yet to come up with the final explanation on what moral human rights are to legal human rights and *vice versa*. However, as Çalı indicates, the proposal to treat them as completely distinct categories is rather disturbing, especially since it undermines the very objective of international human rights law, which was to institutionally address moral wrongs witnessed through human history.¹²

As far as this thesis is concerned, once again, the distinction between the two categories is perhaps most noticeable in the first chapter, since it covers scholars who have primarily analysed moral rights (as they understood them), while the rest focuses on legal rights, *i.e.*, rights that are based on and defined within international conventions and national legal documents.

2. Absolute Human Rights prior to the Global War on Terrorism

Legend has it that during a hunt for a terrorist group who once kidnapped the Prime Minister of Italy and threatened to kill him, an investigator from the Italian security service

⁷ *Ibid*, 17.

⁸ *Ibid*, 18. Buchanan acknowledged that although some legal human rights are a specification of their moral counterpart, others may not be, such as the right to a fair trial before an independent and impartial tribunal. Nonetheless, the latter may still be justified as “instrumentally valuable” for the realisation of a pre-existing moral right. See Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), 50-84.

⁹ Çalı, “International Legal Human Rights and Moral Human Rights”, 19. Scholars that are cited by Çalı as those in favour of this view are: John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999); Joseph Raz, “Human Rights Without Foundations”, in *The Philosophy of International Law*, eds. Samantha Besson, John Tasioulas (Oxford: Oxford University Press, 2010); Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2011).

¹⁰ Çalı, “International Legal Human Rights and Moral Human Rights”, 20.

¹¹ Samantha Besson, “International Human Rights Law and Mirrors”, *ESIL Reflections* 7, no. 2 (2018): chap. 1.

¹² Çalı, “International Legal Human Rights and Moral Human Rights”, 24.

suggested to the general of the state police to torture a prisoner who appeared to have intel regarding the case. The general dismissed the proposal, stating that “Italy is a democratic country that could allow itself the luxury of losing Aldo Moro, but not of the introduction of torture”.¹³ However, this view is not universally shared. The prohibition of torture has traditionally been regarded as a paradigmatic example of an absolute human right and still, there has always been those opposing such a viewpoint.

In general terms, virtually all views that will be presented in the following chapter gravitate towards one of the opposed ethical theories. Namely, authors that advocate for the existence of absolute human rights obviously accept absolutism, a categorical (or deontological) theory that considers certain acts as intrinsically wrong,¹⁴ irrespective of their effects and consequences, which have no ethical relevance, and hence, those acts must be avoided at all costs.¹⁵ In contrast, opponents of absolute human rights mostly derive their positions from consequentialist (or teleological) theory, which evaluates the morality of an action by reference to its consequences.¹⁶ Absolutism, thus, forbids doing certain things to people, rather than bringing about certain results.¹⁷ As Thomas Nagel remarked, absolutism sets limits to consequential reasoning.¹⁸ Expectedly, from absolutist point of view, certain

¹³ Elizabeth Fox, “A Prosecution in Trouble”, *Atlantic Monthly* 3 (1985): 38, as cited in Alan M. Dershowitz, *Why Terrorism Works – Understanding the Threat Responding to the Challenge* (New Haven and London: Yale University Press, 2002): 247. See also Richard Drake, “The Aldo Moro Murder Case in Retrospect”, *Journal of Cold War Studies* 8, no. 2 (2006): 114-125.

¹⁴ David McNaughton, “Deontological ethics” in *Concise Routledge Encyclopedia of Philosophy*, ed. Edward Craig (Routledge, 1999), 202.

¹⁵ Thomas Nagel, “War and Massacre”, in *Consequentialism and its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 60. Most of the criticism of deontology is based on its inflexibility, which led to the conceptualisation of a third approach, the so-called “threshold deontology”. It argues that rules should always be obeyed unless there is an emergency situation, in which one should revert to consequentialism. Two variations of this theory can be detected. According to the simpler one, there is some fixed threshold of awfulness beyond which morality’s categorical norms no longer have their overriding force and such a threshold does not vary with the stringency of the categorical duty being violated. Alternatively, threshold can also be understood as a sliding scale, if it varies in proportion to the degree of wrong being done. See Larry Alexander, Michael Moore, “Deontological Ethics”, *Stanford Encyclopedia of Philosophy*, October 30, 2020, <https://plato.stanford.edu/entries/ethics-deontological/> (accessed 12.12.2023).

¹⁶ Marie-Benedicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, 2006), 78. The most familiar version of consequentialism is utilitarianism, which commonly believe to maintain that the best state of affairs among any possible set is the one that possesses the greatest net balance of aggregate human pleasure, happiness or satisfaction. Samuel Scheffler summarised objections against it, the first being that of Rawls, who claimed that it does not take into account justice or fairness in the distribution of goods and does not consider how satisfaction is distributed among individuals (thus, utilitarianism will favour that wealthy acquire more wealth, whereas others languish in poverty, if the overall satisfaction will be maximised that way). Basically, it ignores intrinsic moral significance of its considerations. Then, it seems to indicate not only that one may but also must do something immoral, such as torture a child of a terrorist in order to save many people, which is for many people unacceptable reasoning. Finally, utilitarianism is quite demanding in a way that it is indifferent towards one’s own pursuits and requires that one may not devote time and energy to itself unless there is no other way in which one could produce more overall good. See Samuel Scheffler, “Introduction”, in *Consequentialism and its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 3.

¹⁷ Nagel, “War and Massacre”, 58. Samuel Scheffler is among authors who noticed the presence of another group, namely the more restrictive non-absolutist who would argue for violation of imposed restrictions with an aim to prevent catastrophe, but not in other, less stringent situations. See Samuel Scheffler, *The Rejection of Consequentialism - A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Oxford University Press, 2003), 86.

¹⁸ Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979), 58.

rights are exceptionless, whereas consequentialists are willing to trade-off any right for the achievement of the utilitarian goal.

Among pioneers in distinguishing absolute from relative rights was Sir William Blackstone. Back in 1795, in *Commentaries on the Laws of England in Four Books*, he recognised that absolute rights belong to particular individuals, merely as single persons, whereas relative are those that are owned by them as members of the society and stand in various relations to each other.¹⁹ Absolute rights were believed to be “those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it”.²⁰ Blackstone noted that the rights of personal security, liberty, and private property amount to absolute rights of individuals.²¹ The right of personal security was said to include person’s legal and uninterrupted enjoyment of life, limbs, body, health, and reputation.²²

Later, Sir William David Ross differentiated between *prima facie* and absolute right, where the former is the one that may be violated if the appropriate conditions hold, while the latter, if there is such, would “hold come what may” and could never be overridden for any reason.²³

But the one who was remarkably invested in the topic was Alan Gewirth. He began his essay on absolute rights with the initial assertion that “it is widely held opinion that there are no absolute rights”.²⁴ To test that claim, he firstly had to clarify a few points, so that the possible definition of absolute rights could be proposed.²⁵

According to Gewirth, a right is *fulfilled* when the correlative duty is carried out; a right is *infringed* when the correlative duty is not carried out; a right is *violated* when it is unjustifiably infringed; a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, thus the required action is justifiably not performed or the prohibited action is justifiably performed.²⁶ Finally, a right is *absolute* when it cannot be overridden in any circumstances, meaning that it can never be justifiably infringed and it must always be fulfilled without any exceptions.²⁷ Put differently, infringement of an absolute right automatically amounts to its violation.

In addition, Gewirth differentiated between three levels at which a right may be qualified as absolute.²⁸ At the top is “Principle Absolutism”, where absolute can only be

¹⁹ Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: J.B. Lippincott Co., 1893), Vol. 1 - Books I & II, Chapter I: Of the Absolute Rights of Individuals, 123 (available online via Liberty Fund, Inc, <https://oll.libertyfund.org/page/blackstone-on-the-absolute-rights-of-individuals-1753>) (accessed 12.06.2023).

²⁰ *Ibid.*

²¹ Hugo Bedau, “The Right to Life”, *The Monist* 52, no. 4 (1968): 564.

²² *Ibid.*

²³ William David Ross, *The Right and the Good* (New York: Oxford University Press, 1930), 19-20.

²⁴ Alan Gewirth, “Are There Any Absolute Rights?”, *The Philosophical Quarterly* 31, no. 122 (1981): 1.

²⁵ Gewirth accepted the Hohfeldian model of rights, hence the rights in question are claim-rights in that they are justified claims or entitlements to the carrying out of correlative (positive or negative) duties, and such an approach will as well be followed in this text, Gewirth, “Are There Any Absolute Rights?”, 2.

²⁶ *Ibid.*, 2.

²⁷ *Ibid.*

²⁸ *Ibid.*, 3.

some universal moral principle that lays down a general formula for all the diverse duties of all respondents or agents toward all subjects or recipients.²⁹ The issue with this kind of principles is obviously their incapability of specifying precise entitlements and obligations or solving particular moral dilemmas.³⁰ Examples of such principles could be the ones stating that human rights protection is a concern of the whole international community or that human rights are an essential part of democracy.³¹ For their apparent incapability of differentiating between various types of rights, these principles remain just a general formula for deriving other forms of absolutism.³²

On the other end of the spectrum, Gewirth placed “Individual Absolutism” that accounts for the highest degree of specification, hence it can be said that a person has an absolute right to some particular object (or act) at a particular time and place when all considerations for overriding the right in the particular case have been eliminated.³³ Arguably, this level can be reduced to a post-displacement residue, or even post-consequentialist residue, but the point is that if absolute quality is brought down only to the most concretised rights, it will certainly lose its power to guide general behaviour and can no longer be considered as a general standard applicable to all.³⁴ What is more, with enough specification, any right could eventually be considered absolute.³⁵

Finally, in the middle is “Rule Absolutism”, according to which potential absolute rights are characterised in terms of specific objects with possible specification also in regard to subjects and respondents, hence it may vary in degree of generality, but its content regarding the entitlements and correlative duties is assertable.³⁶ It is said that “Rule Absolutism” reflects an agreement reached within a particular society to qualify certain rights as absolute, such as the prohibition of torture or other forms of ill-treatment embodied in the Article 3 of ECHR.³⁷ Even though Gewirth continued to explain that the question of absolute rights arises most directly at this particular level,³⁸ the analysis is not without a problem. Namely, if a right must be valid without exceptions in order to be absolute and yet may still vary in its generality, then it is possible for its specifications regarding objects,

²⁹ *Ibid*, 3–4.

³⁰ Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR - Absolute Rights and Absolute Wrong* (Hart Publishing, 2021), 18.

³¹ 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 (1998): 515.

³² Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 515.

³³ Gewirth, “Are There Any Absolute Rights?”, 4.

³⁴ Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 18–19.

³⁵ Russ Shafer-Landau, “Specifying Absolute Rights”, *Arizona Law Review* 37, (1995): 209. He claimed that the case of potential conflict between rights and other moral considerations, including also rights, may be resolved by reducing the scope of the right through its specification, *i.e.*, by adding exceptive clauses, while retaining maximal stringency, *ibid*, 225.

³⁶ Gewirth, “Are There Any Absolute Rights?”, 4.

³⁷ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 515.

³⁸ Gewirth, “Are There Any Absolute Rights?”, 4.

subjects or respondents to be considered as exceptions to the more general rights.³⁹ Hence, either there are no absolute rights, since all of them require some kind of specification or all rights are equally absolute, because once their specifications are established, they are entirely valid without any further exceptions.⁴⁰

The solution for this dilemma may be in Gewirth's proposal of three criteria for permissible specifications:

- permissible specifications can only be such as result in a concept that is recognizable to ordinary practical thinking, which eliminates rights that are overloaded with exceptions;
- permissible specifications must be justifiable through a valid moral principle (by way of explanation, there is no good moral justification for incorporating racial or religious restrictions on the subjects of the right);
- permissible specifications cannot contain any reference to the possibly disastrous consequences of fulfilling the right (as when some argue that there are no absolute rights, they usually claim that any right may be overridden if this is required to avoid certain disasters – for instance, that infringing the absolute prohibition of torture will enable the authorities to find out where a terrorist has hidden a bomb).⁴¹

Natasa Mavronicola, who recently monographed the topic of Article 3 of the ECHR, commented extensively on Gewirth's viewpoints in an effort to present her own understanding of absolute rights.⁴² In that regard, she differentiated between the applicability parameter of absoluteness, which offers basis for understanding absolute rights as non-displaceable entitlements and the specification parameter, which is of paramount importance, since it delineates the substantive scope of the right and therefore, determines what is unlawful.⁴³ However, she expressed awareness that specification is linked to potential risks, such as the one of uncertainty, if it narrows the scope in a manner that the right loses its capacity to guide behaviour *ex ante* or if it overburdens the right with certain qualifiers.⁴⁴ Additional risk may be found in the possibility that specification can have an effect of (disguised) displacement, if it brings extraneous considerations into framing the content of the absolute rights.⁴⁵

As a result, she adjusted Gewirth's requirements and, apart from the implied requirement of good faith, proposed the following features of legitimate specification of an absolute right, that should serve as the absoluteness starting point:

- it must have the capacity to guide (thus, over-generality and over-specificity are excluded, and adjudicative bodies have a particular duty to provide meaningful, clear and generalizable specification of the substance of the right);

³⁹ *Ibid.* As an example he suggested the following statement "all persons have a right not to be killed except when the persons are not innocent, or except when such killing is directly required in order to prevent them from killing somebody else", *ibid*, 5.

⁴⁰ *Ibid.*

⁴¹ *Ibid*, 5–6.

⁴² Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 9–26.

⁴³ *Ibid*, 21.

⁴⁴ *Ibid*, 22.

⁴⁵ *Ibid.*

- it must be premised on reasoning which relates to the wrongs that the right proscribes (in other words, the right should be interpreted in a way that it remains loyal to the objectives it safeguards instead of being distorted by irrelevant considerations);
- it must not amount to displacement of the right (for instance, possible desirable consequences of infringement of an absolute right must not be part of specification, because they will amount to the displacement of the right through a back door).⁴⁶

This adjustment of Gewirth's initial criteria for specification is particularly appropriate for absolute (legal) rights, *i.e.*, those located in legal instruments, thus Mavronicola validly remarked that Gewirth's moral reasoning seems like it took place in a legal and textual vacuum.⁴⁷

Second part of Gewirth's essay addressed main arguments of consequentialists, who argue against absolute rights, since one can always imagine the consequences of fulfilling certain right being so disastrous that the right may need to be overridden.⁴⁸ That is usually called a "ticking bomb" scenario. Gewirth framed it as a situation in which a group of terrorists with an arsenal of nuclear weapons require that an individual named Abrams torture his mother to death or, otherwise, they will use the weapon against some designated city.⁴⁹ To put it another way, the question is whether Abrams should infringe the absolute prohibition of torture with regard to his mother in order to prevent nuclear catastrophe and consequently save incomparably more lives? Therefore, many construct the puzzle of absolute human rights as an issue of conflict of rights by constructing such examples where those considerations that are not supposed to displace an absolute right, are actually also rights. In fact, the question arises – how can it be that everyone can have equal moral rights, if there are certain rights that may never be overridden by any considerations, even if they have catastrophic consequences for the equal rights of others?⁵⁰

Gewirth's answer was multifaceted. His non-legal argument boiled down to the fact that terrorists who make such demands cannot be trusted to keep their promise not to drop the bombs if the mother is tortured to death and even if they do, there is no guarantee that the situation will not escalate in the future.⁵¹ Also, he recalled that Philippa Foot had sagely commented on cases of this sort in a manner that if it is the son's duty to kill his mother in order to save the lives of others, then "anyone who wants us to do something wrong has only to threaten that otherwise something worse will be done".⁵² Nevertheless, main point was that in this Gewirth's scenario there is no conflict of rights, because by deciding to respect his mother's absolute right and refusing to torture her to death, Abrams is not violating (possibly also absolute) rights of other residents who may die as a result.⁵³ Other

⁴⁶ *Ibid*, 23–25.

⁴⁷ *Ibid*, 24.

⁴⁸ Gewirth, "Are There Any Absolute Rights?", 7.

⁴⁹ *Ibid*, 8.

⁵⁰ *Ibid*, 6.

⁵¹ *Ibid*, 10.

⁵² Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect", *Oxford Review* 5 (1967): 10.

⁵³ Gewirth, "Are There Any Absolute Rights?", 11. Part of this explanation, Gewirth based on the "principle of the intervening action", according to which the terrorists are morally and causally responsible for the deaths of others that may follow the refusal of the son to torture his mother to death. But the son cannot be responsible for that side-effect of his refusal because of the terrorists' intervening action. For more, see *ibid*, 12-13.

residents do not have a right that the mother's right not to be tortured to death is violated for their sakes and again, in protecting his mother's right, Abrams does not violate the rights of the others.⁵⁴ For this reason, absolutists can claim that even if others die, that does not affect the absolute nature of theirs or anyone else's right. To wit, given that their death is a consequence of terrorists' unjustified action, their right to life will remain absolute even if they are killed as a result of the son's refusal, and it is not he who violates their rights, but the terrorist who killed them.⁵⁵

Considering that the suggested solution so far seems to be letting nuclear catastrophe to occur, even though unimaginable consequences may arise, Gewirth instructed us to differentiate between abstract and concrete absolutism. The former pays no regard to consequences or empirical (or causal) connections that may affect the ensuing outcomes of the alternatives that are being appraised, but only considers those alternatives as being both mutually exclusive and exhaustive.⁵⁶ On the other hand, the latter takes account of consequences and empirical connections, but each time within the limits of the right that is believed to be absolute.⁵⁷ Consequentialism of concrete absolutist is hence limited, but there is still a broader range of possible alternatives that are being considered compared to the rather simple dualism which is inherent to abstract absolutist.⁵⁸ Applied to the case of Abrams, the distinction may lead to different outcomes.

If he were an abstract absolutist, he would consider only two possibilities, that are mutually exclusive – either he tortures his mother to death, or the terrorists kill thousands of others by dropping a nuclear bomb.⁵⁹ However, were he a concrete absolutist, he would take into account additional considerations, such as that his torturing will not necessarily prevent the death of others, which may occur even if he obeys the appointed requirement.⁶⁰ He may also recognise that his obedience may be followed by further threats of nuclear catastrophe unless some other evil is done, since terrorists cannot be trusted to keep their word, or that his refusing to torture his mother may not lead to the death of others because authorities may become involved and prevent it and so forth.⁶¹

Therefore, this distinction allows understanding that by choosing to respect mother's absolute right, Abrams did not necessarily opt for nuclear catastrophe, since many factors had to be counted in, which is why concrete absolutism appears to be more compatible with the real-life settings. Compared to the rather black-and-white reasoning of the abstract absolutist, the wider deliberation of the concrete absolutist allows for possible alternatives and various consequences, hence offers the greatest probability of averting the threatened catastrophe.⁶² For that reason, Gewirth proclaimed it to be the preferred kind of ethical reasoning.⁶³

⁵⁴ *Ibid*, 14.

⁵⁵ *Ibid*, 13.

⁵⁶ *Ibid*, 14.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*, 14–15.

⁶² *Ibid*, 15.

⁶³ *Ibid*.

Soon after Gewirth's essay on absolute rights was published, he was strongly criticised by Jerrold Levinson, who challenged the theory mostly because of its heavy reliance on the principle of intervening action.⁶⁴ Due to this principle, Abrams does not violate the rights of the others, since the immediate cause of their death is the free actions of other agents – the terrorists.⁶⁵ Hence, Levinson insisted that it is in fact the principle at hand that serves to protect the absoluteness of the mother's right.⁶⁶ He offered a counterexample in an effort to exclude any such intervening actions.

So, his Abrams is now a biological scientist Adams, whose experiment with highly virulent variety of cholera went downhill once he discovered that it had mutated and became resistant to any conventional cures and cannot be destroyed by any physical methods of neutralisation.⁶⁷ As luck would have it, Adams quickly realised the possible solution, which would require the production of antibodies in the bloodstream of a person with a particular blood type who is subjected to extreme pain and fright before expiring, or in other words, who is tortured to death.⁶⁸ However, his reaction has to be immediate since there is only half an hour before the bacteria escapes and the only known person near him with the compatible blood type is his mother.⁶⁹ And there is the dilemma – either his mother's absolute right is infringed by torturing her to death or half of the mankind will lose their lives.

Owing to the fact that the principle of intervening action cannot be applied in this case, Levinson was determined that Adams would be morally responsible for the deaths of others.⁷⁰ He underlined that these are the cases of conflicts of (two) stringent rights, where one would have to override the other, thus that Gewirth failed to prove conclusively that there are any absolute rights.⁷¹

Gewirth was swift to respond. His first line of rebuttal was based on the unconvincing terms of the counterexample, as well as Levinson's ignorance towards his distinction between abstract and concrete absolutism.⁷² Namely, if Adams were a concrete absolutist, he would ascertain other options, instead of being short-sighted by only two extreme alternatives.⁷³ Although Gewirth admitted that the principle of intervening action is not applicable in Levinson's case, he introduced another one, namely, the principle of the wrong prior action.⁷⁴ Given that Adams as a professional scientist was in a position to anticipate that his experiment may lead to an extreme danger, his actions were wrong and unjustified, thus every further outcome is caused by his prior wrongdoing.⁷⁵ That being so, no possible

⁶⁴ Jerrold Levinson, "Gewirth on Absolute Rights", *The Philosophical Quarterly* 32, no. 126 (1982): 73.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 74.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 75.

⁷¹ *Ibid.*

⁷² Alan Gewirth, "There Are Absolute Rights", *The Philosophical Quarterly* 32, no. 129 (1982): 349.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 350.

⁷⁵ *Ibid.*

infringement of the rights would be justified, therefore rights would not be overridden, but violated and hence, remain absolute.⁷⁶

When it comes to the conflict of rights, Gewirth did not hold on to his prior position that in such cases there is none but allowed for the possibility that a potential conflict between rights that safeguard objects of an equal importance emerged.⁷⁷ He suggested that in this kind of conundrum, it is the negative right that should be prioritised over the positive ones, not only because positive actions carry the certainty (of Adam's mother dying, in Levinson's example), which cannot be said for negative actions and omissions, but also since the inaction or omission does not lead to the same exclusive responsibility or the same degree of culpability.⁷⁸ With the contemporary human rights theory in mind, it seems appropriate to make a slight terminological alternation and use the terms negative and positive *obligations* of the particular right.⁷⁹ Although absolute rights generate a number of both negative and positive obligations, Mavronicola rightly argued that there is no positive obligation to violate the negative obligation under an absolute right.⁸⁰ That is to say, there is no positive duty for Abrams to torture his mother to death. Or, in the case of abduction, many positive obligations for the State arise, such as the one concerning effective investigation, but there is no positive duty to torture the kidnapper in order to find out where the hostage is.⁸¹ Positive obligations cannot be and are not meant to be without boundaries and committing absolute wrongs should not be the way of protecting persons from a general or concrete risk of harm.⁸² Jeremy Waldron also acknowledged that there is no philosophical consensus regarding the conflict of rights.⁸³ While some emphasise the distinction between acts and omissions or the structures of agent-relativity, which would err equating violation of one's rights and failure to save another's life by refusing to violate rights,⁸⁴ others, mostly consequentialists, object to this kind of logic considering it unreasonable and unacceptable.⁸⁵ Proponents of the first view would rightly argue that refusing to intentionally violate the right of A even though it is crucial for saving the life of B can by no means amount to disrespecting B, for the fact that responsibility lies solely with those who actually killed B.⁸⁶ Either way, it is worth mentioning that some authors even

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 351.

⁷⁸ *Ibid.*, 352. The infringement of mother's right would require Adam's positive action of torturing her to death. However, in the case of others, Adams' omission (by not conducting torture) cannot be regarded as killing them but rather letting them die, or more precisely, failing to intervene to prevent their deaths, *ibid.*, 351.

⁷⁹ Dinah Shelton and Ariel Gould, "Positive and Negative Obligations" in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford University Press, 2013), 562-586.

⁸⁰ Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 13.

⁸¹ *Ibid.* Mavronicola also explained that due to the specification of the right, such a positive obligation does not exist, *ibid.*, 14.

⁸² *Ibid.*, 25.

⁸³ Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (New York: Oxford University Press, 2010), 32.

⁸⁴ Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishers Ltd, 1974), 30.

⁸⁵ Amartya Sen, "Rights and Agency", in *Consequentialism and its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 191-196, as cited in Waldron, *Torture, Terror, and Trade-Offs*, 32.

⁸⁶ Waldron, *Torture, Terror, and Trade-Offs*, 32.

interpreted Gewirth's wording as claiming that absolute rights can only be those "that survive conflicts with other rights".⁸⁷

After all, for Gewirth, it was a tribute to the absolutist thesis that it could only be challenged by Levinson's utterly unrealistic assumptions.⁸⁸

In the same year when the two scholars communicated their discussion, Jack Donnelly published his contribution regarding natural rights, in which the issue of absolute rights was also tackled.⁸⁹ To start with, he took the view that if there were any absolute rights, then only one natural right could exist, since assuming that rights cannot conflict with each other would be unrealistic.⁹⁰ He also indicated that the idea of absolute natural rights was incompatible with both logic and experience.⁹¹ The presented case was the terrorist who is holding a hostage and threatening with a world-will-end catastrophe unless some individuals are killed in the name of people's justice and the only way to stop him is shooting or otherwise killing the hostage.⁹² Although Donnelly correctly noted that shooting is that act that would violate hostage's right to life, he claimed that only extreme, nearly mindless deontologist would qualify the act as immoral.⁹³ Therefore, the conclusion was that even the most basic natural rights are "relatively absolute at best".⁹⁴ Although he admitted that human rights as the strongest moral claims available usually take priority over utilitarian considerations, for Donnelly treating rights as absolute was simply an unjustified exaggeration.⁹⁵

Still within the realm of contemplating natural rights, completely opposite route was taken by John Finnis. For him, killing an innocent person with the aim of saving lives of some hostages is an act which in itself does nothing but damage the basic value of life.⁹⁶ The goods that will presumably be obtained as an outcome of the release of hostages, should it happen at all, would not be obtained by the act of killing *per se*, but by a distinct, subsequent act, which would be only one of many consequences of the act of killing.⁹⁷ Simply put, it is indeed possible that the consequences of an act seem likely to be very good and to directly promote further basic human good, but these goods will not be secured (if at all) as consequences of one-and-the-same act, but of other acts (by different person, at different time and place, as a result of another free decision and so on). So, Finnis revealed that consequences, however foreseeable or certain they may appear to be, cannot be

⁸⁷ Addo and Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?", 514.

⁸⁸ Gewirth, "There Are Absolute Rights", 351. Mavronicola also agreed that Levinson embraced rather than disputed Gewirth's theory, even though he was explicit in his understanding that there are no absolute (moral) rights, Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 11.

⁸⁹ Jack Donnelly, "Human Rights as Natural Rights", *Human Rights Quarterly* 4 (1982): 391-405. At the very beginning of the paper, Donnelly clarified that contemporary human rights doctrines are grounded in natural rights theory of human rights, since human rights are natural for their source being human nature, *ibid*, 391.

⁹⁰ *Ibid*, 395.

⁹¹ *Ibid*.

⁹² *Ibid*, 396.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

⁹⁶ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 119.

⁹⁷ *Ibid*.

commensurably evaluated, leading to the conclusion that “net beneficial consequences” is actually an absurd general objective or criterion, as well as that consequences cannot be used to characterise the act itself as anything other than an intentional act of, in the given example, killing.⁹⁸ For that reason he proclaimed consequentialism to be “morass of arbitrariness”,⁹⁹ its reasoning to be senseless and as a result, suggested its exclusion due to the naively arbitrary limitation of focus to the purported calculus “one life versus many”.¹⁰⁰ Finally, the consequences in the form of damage to one basic value can never be outweighed by consequences in the form of benefit to other basic value(s), since each value is objectively basic, primary and incommensurable with others in terms of objective importance.¹⁰¹ Few decades later, Finnis maintained his stance by openly admitting that some human (or natural) rights are absolute, since certain kinds of acts ought never to be done owing to an indefeasible, exceptionless moral duty of justice that every individual has.¹⁰² He suggested that absolute norms (and rights) must be defined in terms of the intentions behind actions, not their unintended consequences.¹⁰³ For a norm to be truly absolute (he also marked the “exceptionless norms”), it must forbid only acts intended to cause certain harms, such as torture), not acts that might foreseeably but unintentionally result in such harms (in form of side-effects), since “logic requires that a norm’s absoluteness narrow, not broaden its scope as an absolute”.¹⁰⁴

In outlining essential features of his own right-based theory and criticism of utilitarianism, John Laslie Mackie differentiated between “basic abstract *prima facie* rights”, such as rights to life, health, liberty, pursuit of happiness and absolute rights, such as the one to “equal respect in the procedure that determine the compromises and adjustments between the other, *prima facie*, rights”.¹⁰⁵ As most of the rights are *prima facie* ones, Mackie explained that they are defeasible and capable of being overridden, because they can conflict

⁹⁸ *Ibid*, 121.

⁹⁹ *Ibid*, 124.

¹⁰⁰ *Ibid*, 119. Finnis explained senseless in a way that no plausible sense can be admitted to the consequentialist terms such as a “greatest net good”, “best consequences”, “lesser evil”, “smallest net harm” or “greater balance of good over bad than could be expected from any available alternative action”, *ibid*, 112.

¹⁰¹ *Ibid*, 118-119, 121-122. That is to say, for Finnis it would be morally wrong to commit the act that would lead to damaging basic values, such as for authorities to kill one in order to save millions. This argument was openly criticised as inadequate by Michael J. Perry, who argued that different basic values are indeed commensurable, since they can all be compared to a single standard and claimed that even Finnis admitted this fact along the lines. Therefore, according to Perry, it is possible to make a judgment on whether the consequences of an act in a form of benefit would outweigh the consequences in the form of damage to basic values (in terms of the same standard). Be that as it may, Perry admitted that even if it turns out that the benefits would prevail, that does still not mean that one is morally obliged to commit the act leading to them. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998), 97-98.

¹⁰² John Finnis, “Absolute Rights: Some Problems Illustrated”, *The American Journal of Jurisprudence* 61, no. 2 (2016): 195.

¹⁰³ *Ibid*, 195-196.

¹⁰⁴ *Ibid*, 197-198.

¹⁰⁵ John Laslie Mackie, “Rights, Utility, and Universalization” in *Utility and Rights*, ed. Raymond G. Frey (University of Minnesota Press, 1984), 87. Some of the main objections against utilitarianism that he underlined was that maximizing of utility may call for sacrificing the well-being of one individual, without limit, with an aim of promoting that of others, which is exactly what right-based theories stand against. In other words, he opposes the fact that utilitarianism treat all persons as one homogenous group, without taking into account their individual interests, as an “egoist would weigh together all his own desires or satisfactions”, *ibid*, 86-87.

with one another.¹⁰⁶ Once again, he stood against utilitarianism, by explaining that a resolution of such conflicts should be found by balancing them against one another, instead of weighing their merits against some different standard of value, such as utility.¹⁰⁷ In any case, Mackie is among those who recognised that there are certain absolute rights, that cannot be overridden.

Not all scholars that dealt with the topic of absolute rights used this term directly or devoted their writings to its conceptualisation. Some have simply deliberated on torture, as a paradigmatical example of such a category, in an attempt to get the ball rolling.¹⁰⁸ In words of Alan M. Dershowitz, "torture remains a staple of abstract philosophers debating the virtues and vices of absolutism".¹⁰⁹ For Edward Peters, torture is "the supreme enemy of humanitarian jurisprudence" and "the greatest threat to law and reason that the 19th century could imagine".¹¹⁰ Along with the piracy and slavery, torture can be regarded as *hostis humani generis*.¹¹¹ Despite the fact that it was back in 1911 when the article on torture in the *Encyclopaedia Britannica* stated that "the whole subject is now one of only historical interest as far as Europe is concerned"¹¹², torture remains to this day well and alive not only in academic debates but also in practice.

Widely cited on the matter is Henry Shue, who emphasised that apart from slavery, no other practice is so universally and unanimously condemned as far as international law and human rights conventions are concerned.¹¹³ He ingeniously depicted the essence of torture by characterizing it as "the ultimate shortcut".¹¹⁴ In his effort to prove that all torture must be considered reproachful, although attempts to justify its use can still be found in both literature and policy,¹¹⁵ he made several important points.

For torture to be morally less unacceptable, Shue suggested that it must be constrained in the sense that victim needs to have an effective option for surrender, a way to put an end to the particular treatment.¹¹⁶ Such a surrender may usually be realised by complying with the requirements of the torturer. Simply put, the victim must be informed of the purpose of torture and capable of performing an action that will fulfil that purpose in order to secure permanent cessation of further torture.¹¹⁷ To test whether such a "constrained torture" could exist, Shue differentiated between two types of torture.

¹⁰⁶ *Ibid*, 88.

¹⁰⁷ *Ibid*.

¹⁰⁸ Torture was debated in this sense even by Bentham, who supported it in certain cases and Kant, who opposed it as part of categorical imperative against improperly using people as means for achieving noble ends, John Langbein, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 1977): 68.

¹⁰⁹ Dershowitz, *Why Terrorism Works*, 200.

¹¹⁰ Edward Peters, *Torture* (University of Pennsylvania Press, 1996), 75.

¹¹¹ An enemy of all mankind.

¹¹² *Encyclopedia Britannica – A Dictionary of Arts, Sciences, Literature and Other Information*, 11th ed. (New York: Cambridge University Press), Vol. 27, 72.

¹¹³ Henry Shue, "Torture", *Philosophy and Public Affairs* 7, no.2 (1978): 124.

¹¹⁴ *Ibid*, 141.

¹¹⁵ *Ibid*, 124.

¹¹⁶ *Ibid*, 131.

¹¹⁷ *Ibid*.

Terroristic torture, which is said to be the prevalent one, amounts to the treatment which aim is to intimidate wider public and not the victim itself (for instance, in order to suppress opposition, coup or put down guerrilla movements).¹¹⁸ He described it as the purest possible example of violating the Kantian principle that individuals should never be used merely as means.¹¹⁹ In those cases, torturers will not have any particular reason to reduce the suffering to the minimum necessary amount, quite the contrary, most severe torture (possible even one leading to death of the victim) will make the strongest impact on others.¹²⁰ Therefore, there is nothing that the victim can do to stop it, hence it clearly cannot be characterised as the torture that allows for escape.¹²¹

Different type of torture is interrogational, with a clear objective of extracting information, so the goal is actually something that the victim could have control over.¹²² Shue admitted that in practice, this kind of torture is not less brutal or reduced to the minimum necessary sternness compared to the first one.¹²³ Still, he went on to examine whether at least in theory it could satisfy the constraint of possible compliance. But the answer again appears to be negative because the victim will never be able to convince the torturer that the compliance is completed and that every relevant information is provided (if any is known at all in the case of the wrong person captured).¹²⁴ It is highly unlikely that the torturer will be persuaded to stop the torture simply by the victim telling all there is to tell.¹²⁵ The slightest doubt will always remain part of this transaction and it will, in most cases, lead to further maltreatment, which is why pure cases of interrogational torture are almost only imaginable in theory.¹²⁶ For this reason, neither the first nor the second type of torture are capable of being constrained.

Generally, Shue insisted that for any torture to be justified, certain conditions must be satisfied prior to any cruel action.¹²⁷ Hence, few examples were offered, such as that the purpose of the torture must be supremely morally important and transparent in a manner that it has defined and reachable endpoint.¹²⁸ Nevertheless, whatever those constraints are, terroristic torture is a type of practice that almost certainly cannot be kept within any reasonable bounds, since empirical evidence show not only its uncontrollability, but also its

¹¹⁸ *Ibid*, 132.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

¹²² *Ibid*, 133.

¹²³ *Ibid*, 134.

¹²⁴ *Ibid*, 135. Shue also differentiated between interrogating the ready collaborator, the innocent bystander, and the dedicated enemy. For more, see *ibid*, 134-137.

¹²⁵ *Ibid*, 136. Shue emphasised this point by recalling the infamous maxim of the Saigon police: "if they are not guilty, beat them until they are", *ibid*, 135.

¹²⁶ *Ibid*, 140.

¹²⁷ *Ibid*, 137.

¹²⁸ *Ibid*, 137, 141. Terroristic torture would have to be the least harmful mean for fulfilling the supremely important objective, *ibid*, 137.

metastatic tendency.¹²⁹ Only in philosophical cases we can be assured that the practice of torture once authorised will not be expanded and abused.¹³⁰

Still, Shue made one remark that consequentialists could use as a sign that he conceded in spite of any of his previous considerable endeavours to prove that torture should never be permitted since it can never be justified. After referring to one of the “ticking bomb” scenarios, he admitted that interrogational torture may be permissible in such cases.¹³¹ This is of considerable symbolic importance, due to the immense importance that consequentialist attach to the “ticking bomb” scenarios. As Waldron recollected, according to Bentham, saving one criminal and abandoning 100 innocent persons to the same fate was blind and vulgar humanity.¹³²

However, Shue continued to explain how unlikely the circumstances of these cases are, since they are always constructed in a way that make it seem as if everything is certain - the terrorist is not a suspect but certainly a perpetrator, he is not bluffing, but he certainly did plant a bomb, the device is not jammed but certainly will explode if not deactivated and so forth.¹³³ He even altered the saying that in jurisprudence hard cases make bad law to state that in philosophy artificial cases make bad ethics.¹³⁴

Richard Matthews disapproved of this point, claiming that Shue rejected torture because of wrong reasons, since the issue is not whether the “ticking bomb” scenarios represent hard cases, but the fact that they are completely ingenuine, irrational and purely abstract, hence have nothing in common with the world of humans and should not be part of debates about torture.¹³⁵ Be that as it may, Shue’s premise was that conclusions for ordinary cases simply cannot be drawn from extraordinary ones.¹³⁶ In words of Sumner B. Twiss, “Shue expressed deep suspicion about using extremely implausible cases to inform our moral intuitions about bedrock proscriptions”,¹³⁷ hence Matthews’s remark is actually not too far from Shue’s reasoning. Therefore, Shue did not homage consequentialists by allowing the possible permissibility of torture in artificial philosophical cases,¹³⁸ but highlighted that such cases, apart from being unrealistic, indicate that in order to be morally justified, interrogational torture must be conducted with a sort of surgical precision that is plainly unfeasible. After all, he did come to a conclusion that there is absolutely no reason for weakening the current legal prohibition on torture.¹³⁹

¹²⁹ *Ibid*, 139, 143.

¹³⁰ Waldron also paraphrased Shue’s point, see Waldron, *Torture, Terror, and Trade-Offs*, 220.

¹³¹ Shue, “Torture”, 141.

¹³² Waldron, *Torture, Terror, and Trade-Offs*, 217 citing W. L. and P. E. Twining, “Bentham on Torture”, *Northern Ireland Legal Quarterly* 24 (1973): 347.

¹³³ Shue, “Torture”, 142. Much of Gewirth’s concrete absolutism resembles this line of Shue’s reasoning.

¹³⁴ *Ibid*, 141.

¹³⁵ Richard Matthews, *The Absolute Violation - Why Torture Must Be Prohibited* (McGill-Queen’s University Press, 2008), 88.

¹³⁶ Shue, “Torture”, 141.

¹³⁷ Sumner B. Twiss, “Torture, Justification, and Human Rights: Toward an Absolute Proscription”, *Human Rights Quarterly* 29 (2007): 366.

¹³⁸ Cf. Waldron, *Torture, Terror, and Trade-Offs*, 118.

¹³⁹ Shue, “Torture”, 143.

Philip L. Quinn also maintained that “ticking bomb” examples are hard cases.¹⁴⁰ Since in those cases some find that torture can be justified, he claimed that the absolute moral prohibition of torture is not part of the common shared morality.¹⁴¹ Even though Quinn openly regarded himself as an absolutist,¹⁴² he was sceptical about the fact that one single argument against torture can serve to persuade all, given that moral justifications are always relative to different epistemic contexts across the world.¹⁴³ Accordingly, he proposed that various sets of considerations (from religious to secular) must be presented to members of different societies and insisted that through collective effort over time it is possible to attain an overlapping consensus on absolute wrongness of torture, just as once was achieved regarding slavery.¹⁴⁴ This position was also in accordance with that of Waldron, who stated that all modern moral cultures share the idea of some kind of standards defining maltreatment that people should not be expected to go through,¹⁴⁵ hence in this regard there is at least an inclination towards universalism. On top of that, international law itself rests on such common standards protecting human rights.¹⁴⁶

Finally, it is worth noting that there are even consequentialists who stood against torture. For his part, Lincoln Allison, as a utilitarian, was less optimistic than Bentham on possible benefits of torture, due to his awareness of torture’s extremely corrupting effect.¹⁴⁷ Although he was of the view that it would be both convenient and morally attractive if torture was able to produce welfare that would outweigh the harm it carries, he determinedly concluded that it cannot.¹⁴⁸

3. Absolute Human Rights after the Global War on Terrorism

The September 11th attacks (hereinafter: 9/11), embodied in series of coordinated commercial airplane hijackings and a suicide attacks executed in 2001 by militant extremists associated with al-Qaeda, took nearly 3 000 lives.¹⁴⁹ These attacks combined were the deadliest terrorist event ever,¹⁵⁰ which represents a greatly disturbing point in history

¹⁴⁰ Philip L. Quinn, “Relativism about Torture: Religious and Secular Response”, in *Religion and Morality*, ed. D.Z. Phillips (London: Palgrave Macmillan UK, 1996), 151.

¹⁴¹ *Ibid*, 152.

¹⁴² *Ibid*, 153.

¹⁴³ *Ibid*, 168.

¹⁴⁴ *Ibid*, 167.

¹⁴⁵ Waldron, *Torture, Terror, and Trade-Offs*, 317. Still, Waldron’s approach was rather moderate, since he explicitly stated that he did not base his ideas “on the existence of moral universals”, *ibid*.

¹⁴⁶ *Ibid*, 329.

¹⁴⁷ Lincoln Allison, “The Utilitarian Ethics of Punishment and Torture”, in *The Utilitarian Response: Essays on the Contemporary Viability of Utilitarian Political Philosophy*, ed. Lincoln Allison (London: Sage Publications, 1990), 24.

¹⁴⁸ *Ibid*.

¹⁴⁹ Peter L. Bergen, “September 11 attacks” *Encyclopedia Britannica*, March 17, 2023, <https://www.britannica.com/event/September-11-attacks> (accessed 17.06.2023)

¹⁵⁰ Statista Research Department, “Deadliest terrorist attacks worldwide 1970-2020, by number of fatalities”, September 2, 2022, <https://www.statista.com/statistics/1330395/deadliest-terrorist-attacks-worldwide-fatalities/> (accessed 17.06.2023)

because it destroyed a landmark of a city that is amongst the world's largest, on the soil of the "Land of Liberty" that has one of the most advanced intelligence agencies¹⁵¹ and armies¹⁵². On the list of the ten deadliest terrorist attacks in the period from 1972 to 2023, 9/11 remains the only one that did not take place in Asia or Africa.¹⁵³ The response of the United States was to launch the Global War on Terrorism initiated by President George W. Bush, which included wars in Afghanistan and Iraq and a series of diplomatic, financial and other efforts to eradicate terrorism around the world.¹⁵⁴ An additional outcome was the establishment of the extrajudicial detention facility in Guantánamo Bay, strategically positioned outside the US territory and infamous for, *inter alia*, allegations of using various forms of torture during interrogations,¹⁵⁵ physical and psychological techniques that had been outlawed, for instance by the European Court of Human Rights after their use by British forces against terrorist suspects in Northern Ireland in the early 1970s or by the Israeli Supreme Court after their use by security forces in Israel against terrorist suspects in the 1990s.¹⁵⁶

The pervasive aftermath of the 9/11 reached every aspect of society, and academia and the judiciary were no exception.¹⁵⁷ Waldron noticed that even international law was beginning to be scrutinised and reconsidered, with proliferation of academic pieces reassessing its true nature, questioning whether it should be considered as law at all and rethinking the commitment to international legal institutions.¹⁵⁸ Marin Scheinin remarked that during the "long-decade" after 9/11, a wide range of counter-terrorism measures were adopted globally, including military interventions, surveillance, torture, restrictive immigration policies, and emergency powers suspending normal legal frameworks.¹⁵⁹ Provocations were so strong, that even the CAT needed to address the situation, by stating that it is "confident that whatever responses to the threat of international terrorism are adopted by State parties, such responses will be in conformity with the obligations undertaken by them ratifying the Convention of Torture".¹⁶⁰

¹⁵¹ Varun Kumar, "13 Best Spy Agencies in the World", RankRed, 1 January 2023. <https://www.rankred.com/best-spy-agencies-in-the-world-1/> (last visited: 17.06.2023)

¹⁵² Statista Research Department, "Largest armies in the world by active military personnel 2022", 2 January 2023. <https://www.statista.com/statistics/264443/the-worlds-largest-armies-based-on-active-force-level/> (accessed: 17.06.2023)

¹⁵³ Statista Research Department, 2022.

¹⁵⁴ "Global War on Terror", Official webpage of the George W. Bush Presidential Library, <https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror#additional-resources-anchor> (accessed: 17.06.2023)

¹⁵⁵ Jeannette L. Nolen, "Guantánamo Bay detention camp", Encyclopedia Britannica, 20 April 2023, <https://www.britannica.com/topic/Guantanamo-Bay-detention-camp> (accessed: 17.06.2023)

¹⁵⁶ Waldron, *Torture, Terror, and Trade-Offs*, 186. See also Israeli Supreme Court, *Public Committee against Torture in Israel v. The State of Israel*, H.C. 5100/94, 53(4) P.D. 817 (1999).

¹⁵⁷ One of the topics that piqued after the attacks was concerning the place of Islam in liberal democracies, see Éléonore Lépinard, *Feminist Trouble* (New York: Oxford University Press, 2020), 1.

¹⁵⁸ Waldron, *Torture, Terror, and Trade-Offs*, 15.

¹⁵⁹ Martin Scheinin, "Counter-terrorism and human rights" in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 581.

¹⁶⁰ UN Committee against Torture, "Statement in connection with the events of 11 September 2001", *Report of the Committee Against Torture on Its Twenty-Seventh Session* (12–23 November 2001), UN Doc. A/57/44, paras. 17–18.

All of this was followed by what Fionnuala Ní Aoláin described as an opportunity for “nihilists and realists” to reduce law to represent just one perspective, that has weakened absolute human rights and allowed interference with “the essential core of other human rights”, by shifting priorities so that security concerns almost always take precedence over protecting human rights.¹⁶¹ Authoritarian regimes have often used these measures to suppress dissent and target minorities under the guise of fighting terrorism, while in Western democracies, many responses were driven by public pressure and fear, leading to human rights restrictions without adequate evaluation of their effectiveness or necessity.¹⁶² In words of Olivier De Schutter “the so-called ‘War on Terror’ has led to a renewed focus on the question of whether torture may be inflicted on suspected terrorists who may be detaining ‘valuable’ information – information, that is, that could save lives of innocent people”.¹⁶³ Law and moral philosophy classes thrived on hypothetical situations that played with comparing and balancing extreme levels of pain inflicted by a torturer on an informant with the amount of pain that could be avoided by using the information obtained in time.¹⁶⁴ Scholars opposing the absolute status of the prohibition of torture were returning to prominence as if the attacks offered them new arguments for their defence of the state power and security against the preservation of human rights.¹⁶⁵ Apparently it was the experience of terrorism that amplified previous arguments *pro* torture of those who had taken this view all along, while at the same time it changed the minds of some who had been opposing torture prior to 9/11.

Waldron observed that it was not just the hard men of state security agencies,¹⁶⁶ but prominent legal scholars that are usually committed to civil liberties who accepted the possibility of torture under judicial supervision,¹⁶⁷ whereas in the philosophical discussion the option of using torture was becoming increasingly acceptable, if not even morally requisite in the context of the ticking bomb scenarios, which were progressively starting to seem realistic after the 9/11 events.¹⁶⁸ But Waldron also recalled David J. Luban’s view that the aim of the ticking bomb scenario is to compel even the most liberals who uphold the absolute prohibition of torture to justify and permit it at least in this one hypothetical scenario.¹⁶⁹ Once they do, they acknowledge that their moral principle can be violated and as a result, they can no longer claim the moral high ground and they find themselves “down in mud with consequentialists”, waiting to see “how much further down [they] will go”.¹⁷⁰

Marie-Bénédicte Dembour noted worrying judicial trends in this period, including decisions that “would have been barely imaginable before September 2001”.¹⁷¹ She pointed

¹⁶¹ Fionnuala Ní Aoláin, “The Cloak and Dagger Game of Derogation”, in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 137.

¹⁶² *Ibid.*

¹⁶³ Olivier De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2014), 295.

¹⁶⁴ Waldron, *Torture, Terror, and Trade-Offs*, 217.

¹⁶⁵ *Ibid.*, 22–23.

¹⁶⁶ *Ibid.*, 187.

¹⁶⁷ Waldron was citing and referring to Dershowitz.

¹⁶⁸ *Ibid.*, 6, 217–18.

¹⁶⁹ *Ibid.*, 218. See also David J. Luban, “Liberalism, Torture and the Ticking Bomb”, *Virginia Law Review* 91 (2005): 1440.

¹⁷⁰ *Ibid.*

¹⁷¹ Dembour, *Who Believes in Human Rights?*, 95.

out the notorious *Suresh* case of the Supreme Court of Canada,¹⁷² in which it was stated that breaching of the *non-refoulement* principle would usually be a violation of the Canadian Charter of Rights and Freedoms, but that such a deportation is still a possibility in Canada¹⁷³. To borrow Dembour's interpretation, the court said that the principle is not absolute, in spite of it having an absolute status in international law.¹⁷⁴ Significantly enough, such a stance is contrary to previous rulings of the same court rendered before 9/11.¹⁷⁵ Stephane Bourgon is also convinced that the *Suresh* case is a manifest example of "the climate of insecurity and times of uncertainty" that were brought by terrorism of September 11th.¹⁷⁶

Equally indicative is the UK Court of Appeal's ruling from 2002 stating that indefinite detention of aliens suspected of terrorism without trial was permissible under the ECHR¹⁷⁷ and in 2004 that evidence possibly obtained by using torture in a foreign jurisdiction need not be inadmissible.¹⁷⁸ In addition, Dembour emphasised the reactions following the decision in *Boumediene v. Bush*, when the US Supreme Court concluded that the Military Commissions Act, which barred foreigners held as "enemy combatants" from challenging their detention, was an unconstitutional suspension of the writ of *habeas corpus* guaranteed in the Constitution.¹⁷⁹ Reports of the decision varied from "major victory for civil liberties" in the *New York Times* to "judicial imperialism of the highest order" in the *Wall Street Journal*.¹⁸⁰ According to John Yoo, author of the controversial "Torture Memos", in which torturous acts were referred to as "enhanced interrogation techniques" with the objective of

¹⁷² Supreme Court of Canada, *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration) and the Attorney General of Canada*, 11 January 2002, SCC 1.

¹⁷³ Stephane Bourgon, "The Impact of Terrorism on the Principle of 'Non-Refoulement' of Refugees: The *Suresh* Case before the Supreme Court of Canada", *Journal of International Criminal Justice* 1 (2003): 184. Bourgon rightly argued that the Court should have considered whether such a prohibition is at least a norm of customary international law binding on Canada, if not even a *jus cogens* norm, *ibid*, 174.

¹⁷⁴ Dembour, *Who Believes in Human Rights?*, 95.

¹⁷⁵ Supreme Court of Canada, *Singh v. Minister of Employment and Immigration*, 4 April 1985, 1 SCR 177, para. 47; Supreme Court of Canada, *United States v. Burns*, 15 February 2001, 1 SCR 283.

¹⁷⁶ Bourgon, "The Impact of Terrorism", 185.

¹⁷⁷ Dembour, *Who Believes in Human Rights?*, 96. Court of Appeal (Civil Division), *A and Others v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502, [2003] 1 All ER 816, 25 October 2002.

¹⁷⁸ Dembour, *Who Believes in Human Rights?*, 96. Court of Appeal (Civil Division), *A and Others v. Secretary of State for the Home Department*, [2004] EWCA Civ 1123, [2004] All ER (D) 62 (Aug), (Approved Judgment), 11 August 2004. "The Secretary of State [...] was not precluded from relying [...] on evidence coming into his hands which had or might have been obtained through torture by agencies of other states over which he had no power of direction.", as cited in Waldron, *Torture, Terror, and Trade-Offs*, 216. This decision was overturned by the House of Lords in *A. (F.C.) and Others v. Home Secretary*, House of Lords decision, December 8, 2005, see Waldron, *Torture, Terror, and Trade-Offs*, 216.

¹⁷⁹ US Supreme Court, *Boumediene v. Bush*, 553 U.S., 12 June 2008, <https://www.refworld.org/cases/US SCT/485141d42.html> (accessed 17.06.2023)

¹⁸⁰ Robert M. Chesney, "Boumediene v. Bush", *The American Journal of International Law* 102, no. 4 (2008): 851.

their final legalisation,¹⁸¹ the decision reflected “a failure to appreciate the danger posed by terrorism”¹⁸².

One of the most controversial authors, at least in terms of how much criticism he met over the years, must be Alan M. Dershowitz.¹⁸³ Since he was often misinterpreted, it is important to highlight that he opposed torture as a normative matter, and he insisted that all his proposals were made with an aim of eliminating or at least reducing the use of torture.¹⁸⁴

Based on his empirical certainty that many nations around the globe are still stealthily practicing torture in their efforts to prevent terrorism, he suggested that it would be more acceptable for the democracy and the rule of law if some forms of nonlethal torture were allowed under the condition of judicial warrant and supervision.¹⁸⁵ His additional argument was that torture must sometimes be effective in crime prevention, otherwise it would not still be used by many countries.¹⁸⁶

He found formal, visible, accountable and centralised systems to be more controllable than off-the-books practices.¹⁸⁷ Also, such a system which requires judicial authorisation would reduce the amount of applied physical violence, thus it would protect a suspect’s rights much better.¹⁸⁸ Dershowitz was convinced that both judges and law enforcement officials would be unwilling to activate the authorisation procedure unless they have compelling evidence that the suspect indeed possesses information for preventing an imminent terrorist attack.¹⁸⁹ Finally, he stressed that “absolute opposition to torture—even

¹⁸¹ It was part of the efforts of lawyers within the Bush administration trying to develop arguments to avoid legal constraints and limitations regarding torture and maltreatment of detainees, as part of their broader counterterrorism policy. Examples of “enhanced interrogation techniques” are prolonged sleep deprivation, binding in stress positions and waterboarding. The aim was to adopt narrower understanding of torture, so that it did not accommodate all cases of intentional infliction of pain during interrogations. The “Torture Memo”, also known as “Bybee Memo” argued not only that the US would not be violating its international obligations by using those “enhanced interrogation techniques” on enemy combatants, but also that ultimately there is no international court that could take issue with their interpretation of the Convention against Torture. See De Schutter, 296-297. See also “A Guide to the Memos on Torture”, *The New York Times*, ND, <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html> (accessed 17.06.2023)

¹⁸² John Yoo, “The Supreme Court Goes to War”, *The Wall Street Journal*, 17 June 2008, <https://www.wsj.com/articles/SB121366596327979497> (accessed 17.06.2023)

¹⁸³ Dershowitz eventually tried to underline that he advocated pro-torture ideas well before 9/11, but the fact is that his most prominent pieces regarding the topic were published after these events, as well as that in his hypothetical examples he relies heavily on 9/11 scenario. See Dershowitz, *Why Terrorism Works*, 221.

¹⁸⁴ In his words: “My argument is not in favor of torture of any sort. It is against all forms of torture without accountability.”, Alan M. Dershowitz, “Torture Reasoning” in *Torture: A Collection*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 257-290.

¹⁸⁵ Dershowitz, *Why Terrorism Works*, 232. One form of non-lethal torture that he strongly suggested was “a sterilised needle inserted under the fingernails to produce unbearable pain without any threat to health or life”, *ibid*, 211.

¹⁸⁶ *Ibid*, 158.

¹⁸⁷ *Ibid*, 232.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid*, 233. Even though he admitted that “there are no guarantees that individual officers would not engage in abuses on their own, even with a warrant requirement”, he did not mention the very probable possibility that a complex and strict procedure of judicial supervision would actually demotivate officials, who will consequently continue with their off-the-book use of torture. See Dershowitz, “Torture Reasoning”, 290.

nonlethal torture in the ticking bomb case—may rest more on historical and aesthetic considerations than on moral or logical ones”.¹⁹⁰

On the other hand, Waldron aptly pointed out that there is no assurance that nonlethal methods would not turn into more deadly and oppressive forms of torture, which is why he “draws the line at torture”.¹⁹¹ He insisted that the line should stay where the law demands it to be and where the human rights norms has insisted it should be drawn.¹⁹²

Dershowitz’s case for pro-nonlethal torture was described as a “stunningly bad idea” by Jean Bethke Elshtain.¹⁹³ Being one of the authors who actually changed their reasoning regarding torture after the events of 9/11,¹⁹⁴ Elshtain did not advocate its legalisation, since torture should never become routine, but she accepted that the prohibition could sometimes be overridden.¹⁹⁵ Despite her claim that she stood neither with Kant nor with Bentham, for deontology making torture impossible while utilitarianism making it too easy and too tempting,¹⁹⁶ she concluded that normative condemnation of torture must be complemented with “appropriate consequentialist considerations”.¹⁹⁷ For her, denouncing “Torture 2”, i.e., coercive interrogation was “a form of moral laziness”.¹⁹⁸

Waldron deprecated her approach for not being direct enough.¹⁹⁹ Not only could Elshtain have elaborated more on the specific forms in which “Torture 2” may appear in real life, but she could have also reflected on different inhuman and degrading treatments that are already encompassing “techniques short of torture”.²⁰⁰

Being confident that the wrongness of torture was not changed after 9/11 attacks, he was not persuaded that Elshtain and other philosophers that were of one mind truly believed that 9/11 affected our moral values.²⁰¹ Just the opposite, his interpretation was that they wanted to say that terrorist attacks simply provoked unthinking absolutists to consider

Waldron similarly criticised Dershowitz, by stating that it cannot just be assumed that the intelligence officials will not lie or misuse their torture related authorities, since he understood some parts of Dershowitz’s texts as if he himself acknowledged that there was something insincere in the proposal to allow only nonlethal torture. To Dershowitz’s argument that abuses in the Abu Ghraib prison in Iraq would be prevented if his judicial warrant mechanism was implemented, Waldron argued that Abu Ghraib was very far from the “ticking bomb” scenario. Waldron, *Torture, Terror, and Trade-Offs*, 219-21.

¹⁹⁰ Dershowitz, *Why Terrorism Works*, 217.

¹⁹¹ Waldron, *Torture, Terror, and Trade-Offs*, 219.

¹⁹² *Ibid.*

¹⁹³ Jean Bethke Elshtain, “Reflection on the Problem of ‘Dirty Hands’” in *Torture: A Collection*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 83.

¹⁹⁴ *Ibid.*, 77. See also Waldron, *Torture, Terror, and Trade-Offs*, 7-8.

¹⁹⁵ *Ibid.*, 83-84.

¹⁹⁶ *Ibid.*, 78-79

¹⁹⁷ *Ibid.*, 87.

¹⁹⁸ *Ibid.*, 88. Comparingly, Torture 1 was denoted as extreme forms of physical torment, *ibid.*, 87.

¹⁹⁹ Waldron, *Torture, Terror, and Trade-Offs*, 8.

²⁰⁰ *Ibid.*, 8-9.

²⁰¹ *Ibid.*, 10.

more thoroughly torture, which they had long ago qualified as permissible in extreme cases,²⁰² or in short, as if they wanted to say, “we told you so”.

Prior to 9/11 torture was and after 9/11 it remains both moral and legal abomination.²⁰³ Thinking of Nozick, for whom rights are side-constraints on the pursuit of general good and Dworkin, for whom they are like trumps over considerations of general utility, Waldron was full of hope that there are still those who truly believe in resilience of rights against considerations such as general utility or security.²⁰⁴ After all, he concluded that revising certain rights may sometimes be acceptable, but this should not apply to rights that the law traditionally regarded as absolute.²⁰⁵ Waldron clarified that by absolute he refers to non-derogable rights and highlighted that combating terrorism should be limited by “certain absolute legal and moral constraints”, since “some rights were designated long ago as absolutes precisely because of the temptation to rethink them or relativise them in times of panic, insecurity, and anger”.²⁰⁶

Apart from absolute rights, civil liberties are indeed balanced against security considerations in line with the consequentialist reasoning. Waldron goes as far as to state that civil liberties are “a matter of more or less”, that they are not even defined until some balancing exercise is undertaken.²⁰⁷ In the new atmosphere of September 11th, he noticed the trend of proposing re-balancing, since a balance that was previously considered acceptable now needed to be reconsidered.²⁰⁸ Simply put, civil liberties must give way if the reasons in their favour remain the same while something is added to the reasons on the other side and the added part in this case is the new or increased threat from terrorism.²⁰⁹

However, Waldron opposed this view by claiming that recalculation after 9/11 can only be seen as requiring us not to accept less liberty and grant the state more power for the sake of the greater security but to have greater courage and brave a higher risk for preserving the same amount of liberty.²¹⁰ He added that the documented display of incompetence and rivalry within US intelligence and law enforcement agencies, who already possessed significant powers leading up to September 11, provides no grounds to assume that granting them more power would enhance their effectiveness in tackling this exceedingly challenging task.²¹¹

As part of a broader criticism of consequentialism, Waldron underlined that we are expected to perceive civil liberties from the perspective of their consequences, which leads to the conclusion that if the consequence of a certain degree of liberty is an increased level of risk, that must be considered when deciding whether that degree of liberty should be maintained.²¹² However, he insisted that “we must be sure that the diminution of the liberty

²⁰² *Ibid.*

²⁰³ *Ibid.*, 4.

²⁰⁴ *Ibid.*, 10.

²⁰⁵ *Ibid.*, 11.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, 30.

²⁰⁸ *Ibid.*, 22.

²⁰⁹ *Ibid.*, 27–28.

²¹⁰ *Ibid.*, 25.

²¹¹ *Ibid.*, 45.

²¹² *Ibid.*, 44.

will in fact have the desired consequence”, or in other words that the case for reducing liberty must be based on the actual prospect that if liberty is reduced, security will not be abused but enhanced.²¹³ Contrary to what a consequentialist would claim, Waldron is of the opinion that we can never know what the prospect is and whether it is worth giving up a civil liberty in order to readjust balance.²¹⁴ Security is not to be treated as a good to be maximised by the society, but as a goal to be achieved, as much as possible, as it is also a matter of more or less.²¹⁵ In his words, “civil liberties are often regarded as rights, and the idea of ‘rights as trumps’ is precisely the idea that rights are not to be regarded as vulnerable to routine changes in the calculus of social utility”.²¹⁶ Hardly is there anybody who believes that balance of rights *versus* rights or some other consideration should be readjusted whenever it appears that some other right-bearer has something to gain from that adjustment, but it needs to be justified by structured arguments that consider special character of rights, moral considerations and intricacies of various relations between one person’s rights and another’s.²¹⁷

Be that as it may, he was well aware that the majority of theories opposing routine trade-offs between rights and consequences still aim to accommodate some sort of “out” in order to avoid the so-called *ruat caelum*, i.e., extreme absolutism that would allow heavens to fall.²¹⁸ Waldron remarked that 9/11 can be regarded as Nozick’s “catastrophic moral horror”.²¹⁹ As a matter of fact, Nozick acknowledged the question whether side constraints are absolute or they may be violated in order to escape the catastrophic moral horror, but avoided answering it.²²⁰ For Waldron, the issue is not to be found in the occurrence of such horror, but in the question of whether the abrogation of rights is the right means to circumvent it.²²¹

While noticing that 9/11 attacks is the closest we have ever got to the real-life ticking bomb scenario, Waldron insisted, just as Shue did, that only a few cases are as precise as philosophical hypotheticals make them appear or as certain as Dershowitz formulated them

²¹³ *Ibid.*

²¹⁴ *Ibid.* Waldron also pointed out one paradox in this context. Specifically, he cited President Bush’s statement that the terrorists who threaten us do so precisely because they hate our freedoms and seek to scare us away from exercising them. However, Waldron raised the question of whether the terrorists’ strategy is actually to provoke those who are supposed to protect us into curtailing our rights. In other words, “if the state’s reaction to A’s attack on B is to curtail B’s rights, can we really say that it is A’s attack that is the standard threat to rights?”. Waldron was certain that the argument of enhancing security which B is supposed to need in order to enjoy her rights cannot be used to justify depriving B of her rights, as doing so would postulate the very same thing (taking away rights by the state in the face of terrorist attack) as both the problem and the solution! *Ibid.*, 175.

²¹⁵ *Ibid.*, 185.

²¹⁶ *Ibid.*, 28.

²¹⁷ *Ibid.*, 33.

²¹⁸ *Ibid.*, 31.

²¹⁹ *Ibid.*

²²⁰ See Nozick, *Anarchy, State, and Utopia*, 30.

²²¹ Waldron, *Torture, Terror, and Trade-Offs*, 31.

to be.²²² Following Shue's argument on torture's metastatic tendency, he remembered that last hundred years proved that torture cannot be kept under rational control.²²³

Moreover, Waldron insisted that the usage of the ticking bomb scenario is silly because torture is hardly ever used in the real world to gather crucial information about specific ticking bombs, but to collect numerous small and seemingly insignificant pieces of data which may only gain importance when combined with other pieces of similar data obtained through various means.²²⁴ Dishonesty of the ticking bomb scenario was found in the attempts to use a far-fetched scenario, better suited for a TV thriller than the real world, in order to deliberately undermine the integrity of certain moral positions.²²⁵

While on the subject, some important contributions regarding torture were also published during the first decade of the 21st century, probably provoked by the wave of 9/11 related discussions.

To begin with, Jamie Mayerfeld opposed the relativisation not only of the absoluteness of the legal prohibition of torture, but also of the moral one, arguing that these two aspects cannot be separated.²²⁶ Claiming that the ban on torture is absolute in legal, but not moral terms could be interpreted as an instruction to break the law in certain cases.²²⁷ As a result, hypotheticals, for too long, "have corrupted our moral and political thinking" and in this world, torture is always wrong.²²⁸

Sumner B. Twiss emphasised several effects of torture that stem from its inherently destructive nature.²²⁹ Firstly, he pointed to its detrimental implications on the victim itself, which amount not only to permanent physical injuries and potential disabilities, but also psychological consequences, such as trauma, chronic depression (often followed by suicidal attempts), anxiety, nightmares, paranoia, flashbacks, and irreversible alternations of brain patterns.²³⁰ From this point of view, it is not surprising that Twiss underlined how for majority of survivors rest of their lives are like living death.²³¹

Another set of considerations regards victim's social environment.²³² Victims of torture usually develop trust issues and aggressive behaviour, which ultimately damages their family and social relations.²³³ Systemic use of violence in any community generates

²²² *Ibid*, 41-42.

²²³ *Ibid*, 42.

²²⁴ *Ibid*, 219.

²²⁵ *Ibid*.

²²⁶ Jamie Mayerfeld, "In Defence of the Absolute Prohibition of Torture", *Public Affairs Quarterly* 22, no. 2, 2008, 124.

²²⁷ *Ibid*, 124.

²²⁸ *Ibid*, 125.

²²⁹ Twiss, "Torture, Justification, and Human Rights", 358.

²³⁰ *Ibid*.

²³¹ *Ibid*.

²³² *Ibid*. The fact that torture also has destructive elements on others is the reason why some, including Twiss, refers to a direct victim of torture as the "primary victim".

²³³ *Ibid*, 359.

collective trauma for the whole society and eventually makes it morally and historically dysfunctional.²³⁴

Finally, taking a cue from Shue, Twiss highlighted torture's metastatic tendency, since there is empirical evidence indicating likelihood that the practice will become routinised and uncontrollable.²³⁵ Following Shue's lead on differentiating between various types of torture, Twiss insisted that it is well documented how interrogational torture will eventually slide into terroristic or recreational torture or even how terroristic torture will turn into recreational, irrespective of any countervails.²³⁶

Moreover, unreliability of interrogational torture for gathering accurate intelligence was also stressed, since torturer can never be completely certain that provided information are correct and/or complete, which usually leads to over-torture.²³⁷ Terroristic torture often cannot be separated from punitive torture, because both of them have the ultimate goal of controlling others through fear.²³⁸ As for recreational torture, it is transparently wrong based on a strong moral intuition that it provokes, or in words of Judith J. Thomson, its wrongness is "a nontrivial necessary moral truth".²³⁹

Therefore, Twiss reminded that upon informed reflection, it is obvious that torture *per se* is intrinsically and grievously harmful not only for the victim, but also for other persons and communities and that it is highly probable that the practice will eventually become standardised, which all lead to the apprehension that all torture is absolutely wrong and should be stringently and non-derogably prohibited "for the benefit (or minimisation of harm) for all".²⁴⁰ Hence, "all human beings have an absolute non-derogable right not to be tortured".²⁴¹

But Twiss also admitted that, unlike Quinn, he is confident that the absolute prohibition of torture is actually already deeply rooted and securely grounded due to its being a subject of an overlapping consensus.²⁴² Namely, hardly is there any moral system in the world that would permit assaulting a person in a way that torture does - by inflicting a pain so severe

²³⁴ *Ibid*, 360. History is fabricated when actual practices are denied by official statements and records and therefore, detached from reality, hence false history can only be remedied through later public disclosure of torture, for instance, through prosecutions or special truth commissions, *ibid*.

²³⁵ *Ibid*, 360.

²³⁶ *Ibid*, 362. According to Twiss, interrogational torture has purpose of acquiring information or a confession, punitive torture is a form of punishment for a crime, terroristic torture tends to control a population by instilling fear, while recreational torture is simply used for fun. Twiss even described recreational torture as "useless violence", but it is highly debatable whether there is such a thing as "useful violence".

²³⁷ *Ibid*, 361.

²³⁸ *Ibid*.

²³⁹ *Ibid*, 363. Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990), 18-20. Her position is also worth mentioning: "I cannot bring myself to believe that what makes it wrong to torture babies to death for fun (for example) is that doing this would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement. My impression is that explanation goes in the opposite direction – that it is the patent wrongfulness of the conduct that explains why there would be general agreement to disallow it", *ibid*, 30.

²⁴⁰ Twiss, "Torture, Justification, and Human Rights", 363-364.

²⁴¹ *Ibid*, 364.

²⁴² *Ibid*, 364.

that it effectively unmake a person from the inside.²⁴³ Since virtually all religious and moral systems recognise the concept of human dignity in some way²⁴⁴ and demand that every person *qua* person should be inviolable, they denounce violation of individual's dignity through torture.²⁴⁵

After all, he rejected that the case of absolute prohibition of torture can be undermined by the ticking bomb scenario, both for its implausibility that Shue already described and the fact that it inflicts fear and anxiety into the reasoning, instead of sharpening our moral intuition.²⁴⁶ Nevertheless, should this scenario actually threaten national security in the real-life cases, an appropriate reaction would be to improve intelligence gathering and develop prevention mechanisms instead of authorizing torture.²⁴⁷ According to Twiss, the main task of invoking the ticking bomb scenario is actually to divert our attention from the devastating nature of torture and doing so is morally dangerous.²⁴⁸

Similar attitude towards the phenomenon of the ticking bomb scenario was adopted by Richard S. Matthews. Even though ticking bombs appear to be detonating all around the literature, he described the hypothesis as both conceptually and empirically wrong.²⁴⁹ The view that was taken boils down to the pseudo-consequentialist nature of the argument, since ticking bomb scenarios are factually inconceivable due to their ignorance towards, *inter alia*, set of conditions required to conduct torture in practice, torture's institutional nature, its empirical consequences and creating a demonizing myth of the "terrorist".²⁵⁰ In words of Alfred W. McCoy, logical weaknesses of the ticking bomb scenario stem from its "improbable, even impossible, cluster of variables".²⁵¹

To Fritz Allhoff's remark that as a moral philosopher, he is not interested in whether torture would ever be morally permissible in practice, but rather only in theoretical arguments *pro et contra* its principal justifiability and testing whether a hypothetical case for torture can ever be constructed, Matthews replied that if understood that way, torture loses its real meaning and bears "no relation to possible empirical instantiations", since it can never be detached from its practical traits and consequences.²⁵²

²⁴³ *Ibid*, 364–365.

²⁴⁴ That can be, for instance, as an intrinsic value *per se*, or through the personification of God or even as an expression of a cosmic soul, *ibid*, 365.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*, 367.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*, 366, 367.

²⁴⁹ Matthews, *The Absolute Violation*, 70.

²⁵⁰ *Ibid*, 96.

²⁵¹ *Ibid*, 72. See Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006), 192.

²⁵² Matthews, *The Absolute Violation*, 96. He is referring to Fritz Allhoff, "A Defence of Torture: Separation of Cases, Ticking Time-bombs, and Moral Justification", *International Journal of Applied Philosophy* 19, no. 2 (2005): 260.

The point is that “such ahistorical and nonempirical ethical theorizing created the moral illusion that torture is justifiable”.²⁵³ That is also why he defied Eitan Felner’s view that the ticking bomb hypothesis can find its use in ethical classrooms.²⁵⁴

Shue’s invocation of the premise that “hard cases make bad law” was rejected as well, because ticking bomb scenario is not a hard case, but rather an ingenuine one, due to its belonging to “the abstract realm of pure logical possibility” and the fact that it is divorced from the world of human beings.²⁵⁵ He used M. Cherif Bassiouni’s assertion that no scenario seen in Abu Ghraib, Guantanamo Bay or Afghanistan come even close to the ticking bomb scenario to confirm his stand that empirical correlate to the imagined scenario can never exist.²⁵⁶ Simply put, given its impossibility, ticking bomb scenario should not have any impact on debates regarding torture.²⁵⁷

With regard to the consequentialist’s reasoning, Matthews reminded that, for instance, Oren Gross, who defended the absolute prohibition of torture, still suggested that “if the circumstances are extreme enough, consequentialist reasoning obliges public officials to torture”.²⁵⁸ Matthews was, though, explicit that even if we were to employ some sort of consequentialist calculations, torture can never be considered as a lesser evil or as happiness maximizing.²⁵⁹ The underlying reason is considerable suffering it imposes not only on the victims and their family members, but also on the torturer (through psychological damage and impacts on family and social life) and wider community.²⁶⁰ Trauma that is inseparably linked with this practice is transgenerational and leaves a far-reaching repercussions.²⁶¹ In addition, it undermines social, political, and economic institutions within the targeted community, hence destroying it in the long run.²⁶²

Oddly enough, defenders of torture openly proclaim that torture can be acceptable only as a last resort and only in exceptional circumstances, but at the same time ignore the obvious need for a state to prepare, tutor and train officials in order for them to become capable of conducting it when the time comes.²⁶³ State can torture only if it creates routine system of violence, *i.e.*, systemic violence, which is why torture can never be exceptional.²⁶⁴

²⁵³ *Ibid*, 97. He continued to explain that applied ethical problems should not be used in this manner, since the ticking bomb scenario does nothing more than force one to admit that if the given premises are true, then the conclusion must be true. Nevertheless, it does not reveal whether the premises are really true, *ibid*, 88.

²⁵⁴ *Ibid*, 98. For Felner’s argument see Eitan Felner, “Torture and Terrorism: Painful Lessons Learned from Israel”, in *Torture: Does It Make Us Safer? Is It Ever Ok? A Human Rights Perspective*, eds. Kenneth Roth, Minky Worden and Amy Bernstein (The New Press, 2005), 42.

²⁵⁵ Matthews, *The Absolute Violation*, 98.

²⁵⁶ *Ibid*, 98. M. Cherif Bassiouni, “Great Nations and Torture”, in *The Torture Debate in America*, ed. Karen J. Greenberg (Cambridge: Cambridge University Press, 2005), 259.

²⁵⁷ *Ibid*, 98.

²⁵⁸ *Ibid*, 15.

²⁵⁹ *Ibid*, 136.

²⁶⁰ *Ibid*.

²⁶¹ *Ibid*, 208.

²⁶² *Ibid*.

²⁶³ *Ibid*, 210.

²⁶⁴ *Ibid*, 216.

When it comes to the argument about preservation of national security, Matthews recalled that David Rieff pointed out that it is a mistaken belief that torture can prevent a ticking bomb from exploding, a belief that only shows complete misapprehension of intelligence, because policies on gathering intel are far more complicated than the elimination of ticking bombs.²⁶⁵ As ex US marine interrogator explained, skills required for successful interrogation are sympathy, warmth, frankness and an overall friendly approach, rather than violent and torturous methods.²⁶⁶

The logical incoherence of claiming that something that will inevitably become routinised will be used only exceptionally, together with the fact that torture's effectiveness and possible benefits can never prevail its outstandingly harmful consequences for the victim, for the family and for the wider community, clearly indicate that it can never be a lesser evil.²⁶⁷ These are all reasons for Matthews to insist that even utilitarians must also absolutely oppose torture.²⁶⁸

The question of potential existence of absolute human rights was also briefly raised by Griffin in his thesis that Tasioulas described as "the most significant philosophical meditation on human rights to emerge in the human rights-intoxicated era".²⁶⁹ Being mainly invested in the topics of identification of relevant criteria for the use of term "human rights", their normative content and weight, Griffin plainly expressed determination that human rights cannot be absolute, since they can conflict not only with each other, but also with other moral considerations, such as welfare or justice.²⁷⁰ Nevertheless, certain ambivalence can be sensed in his admission that there are values, such as our personhood, that resist trade-offs through what he calls "discontinuities", meaning that no amount of conflicting value can ever exceed them.²⁷¹ He even acknowledged that such a stance may echo absolutism, but insisted that it does not support it.²⁷² Griffin did not support consequentialism either, for its cost-benefit calculations being based on assumptions that are oversimplified, unreliable and not probable enough.²⁷³ Finally, it is worth mentioning that while discussing equality, he pointed out Mackie's example of absolute right and offered his own definition of the concept, stating that right is absolute because it is a moral standing itself, and morality can never recommend suspending the moral point of view.²⁷⁴

²⁶⁵ *Ibid*, 94. See also, David Rieff, "Review: The Bureaucrat of Torture", *World Policy Journal* 19, no. 1 (2002): 108.

²⁶⁶ Matthews, *The Absolute Violation*, 219. For more on the former US marine interrogator's stands, see Sherwood F. Moran, "Suggestions for Japanese Interpreters" in *The Phenomenon of Torture*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007): 251.

²⁶⁷ *Ibid*, 119, 210.

²⁶⁸ *Ibid*, 210. Based on these reasons, he is convinced that both utilitarian and virtue-ethical traditions are perfectly capable of supporting exceptionless prohibitions, *ibid*, 179.

²⁶⁹ John Tasioulas, "Taking Rights out of Human Rights" in *Griffin on Human Rights*, ed. Roger Crisp (Oxford University Press, 2014), 9.

²⁷⁰ James Griffin, *On Human Rights* (Oxford University Press, 2008), 68. For the analysis of right-welfare and right-justice conflicts see *ibid*, 63-66.

²⁷¹ *Ibid*, 68.

²⁷² *Ibid*, 80.

²⁷³ *Ibid*, 70-71. He suggested a view for what he says is neither utilitarianism nor consequentialism, but a kind of teleology. For more, see *ibid*, 73.

²⁷⁴ *Ibid*, 39.

While deliberating on Michael Moore's stands regarding torture, Kramer was also sceptical of extreme absolutist categories, hence he adopted the distinction between "strong" and "weak" absoluteness, where the former means that absolute right takes precedence over all other obligations, no matter the circumstances, whereas in the case of the latter, there may be situations of extreme urgency or desperation where another moral obligation outweighs it.²⁷⁵ According to him, (moral) prohibition of torture is absolute in at least weak sense.²⁷⁶

A valuable part of his essay is also the explanation of why it is important that any defence of the absolute prohibition of torture must be based not only on the rights of victims but also on the moral integrity of potential perpetrators, hence a victim-focused approach should be combined with a perpetrator-focused approach, or otherwise it would remain unclear why it is impermissible to torture even those who are considered evil,²⁷⁷ which is a position consistent with Twiss's arguments that were discussed earlier.

Kramer's distinction between strong and weak absoluteness risks undermining the very idea of absoluteness, because it remains unclear why weak absoluteness should be titled "absolute" at all, since it is just a really strong moral obligation. Moreover, it goes without saying that once exceptions are admitted in exceptional cases, it becomes more difficult to resist expanding those exceptions in situations of lesser gravity. In legal and moral discourse, this can have the effect of eroding the protective force of (absolute) human rights, as each new "exceptional" justification sets a precedent for future breaches. Ultimately, since it could be said that the power and clarity of an absolute prohibition lie precisely in its unyielding nature, which serves as a categorical barrier against certain forms of harm, the significance of weak absolutes remains ambiguous.

Once again, Waldron's stances are worthy of recollection even in the conclusion. Not only was he sceptical that "everything is different after 9/11", as a significant proportion of literature suggested at the time, but he also maintained that certain legal prohibitions were constructed exactly for the situations in which it will be challenging to conform to them.²⁷⁸ Thus, the prohibition of torture was established specifically for scenarios where temptation to use torture is greatest, such as in war and terror, and if the prohibition cannot withstand these circumstances, its value is diminished in all other situations.²⁷⁹

In any case, Waldron admitted that after 9/11 it was not particularly difficult to ridicule the idea of an absolute prohibition, at least as a matter of moral philosophy.²⁸⁰ He acknowledged that most of the scholars who were not already a part of the consequentialist camp remained quite moderate in their deontology, since they were ready to turn their back on the absolutes once confronted with Nozick's "catastrophic moral horror".²⁸¹ Hence, deontological principles usually prove to be frail should enough pressure be applied.²⁸²

²⁷⁵ Matthew H. Kramer, "Michael Moore on Torture, Morality, and Law", *Legal Studies Research Paper Series of the University of Cambridge Faculty of Law* (2012): 18.

²⁷⁶ *Ibid*, 29.

²⁷⁷ *Ibid*, 24.

²⁷⁸ Waldron, *Torture, Terror, and Trade-Offs*, 189.

²⁷⁹ *Ibid*, 189-190.

²⁸⁰ *Ibid*, 216.

²⁸¹ *Ibid*, 217.

²⁸² *Ibid*. Interestingly enough, Waldron reminded how David Sussman's distinguished accounts explaining inherent wrongness of torture and accounts demonstrating that what is inherently wrong may never in any

Waldron unapologetically accused academics of being afraid to appear unrealistic if they defend absolutism, so they cave in and allow moral restraints to be abandoned when the stakes are high enough, since creatively imagined extreme circumstances can make any moral absolute look silly.²⁸³

He concluded with an unpleasant point, that “for a culture supposedly committed to human rights, we have amazing difficulty in even conceiving—without some sort of squirm—the idea of genuine moral absolutes”.²⁸⁴

The point he continually maintained is that some acts are contrary to the very spirit of law and torture is one of them.²⁸⁵ In this regard, Waldron cited H.L.A. Hart’s concept of “the minimum content of natural law”, the idea that there are certain types of rules that a legal system could not do without, considering “humans as they are and the world as it is”, because such rules are so fundamental to a legal system that without them all other rules would be pointless.²⁸⁶ Hart observed that unless certain physical, psychological or economic conditions are satisfied, no system of laws or code of morals can be established,²⁸⁷ thus implying that rules of certain content are a necessary precondition for the existence of all other rules.

There may be some things appearing justifiable in theory, yet their permissibility could significantly affect the rest of the law, which is a compelling reason for not allowing them.²⁸⁸ Hence, legal prohibition of torture should remain intact, even if “we cannot make a case in purely philosophical terms for a moral absolute”.²⁸⁹ Otherwise, the integrity of our legal system would be jeopardised, leading us to depart from a state in which our law has “a general virtue of non-brutality” and arrive to a point where such a trait would be compromised and corrupted.²⁹⁰ The thought of allowing most atrocious of practices is offensive to contemporary ideas of decency, dignity, and our civilisation’s accomplishments.²⁹¹

After all, it is worth recalling the words of Robert M. Adams that “nothing in the history of modern secular ethical theory gives reason to expect that general agreement on a single comprehensive ethical theory will ever be achieved”²⁹², and the same probably stands for this topic. Having said that, the aim of this chapter was to illuminate main arguments about

circumstances be done, for that “inherently” does not imply “absolutely”. See David Sussman, ‘What’s Wrong with Torture?’ *Philosophy and Public Affairs* 33, no. 1 (2005): 2-3.

²⁸³ Waldron, *Torture, Terror, and Trade-Offs*, 217.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*, 221.

²⁸⁶ *Ibid.*, 215. Hart claimed that those are the prohibitions restricting the use of violence in killing or inflicting bodily harm; rules requiring forbearances; rules that ensure mutual abstinence from aggression and inflicting harm; rules which require respect for property, division of labor and co-operation, together with rules that secure the recognition of promises as a source of obligation and that a legal system must contain sanctions, see Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 193-200.

²⁸⁷ *Ibid.*, 193-194.

²⁸⁸ Waldron, *Torture, Terror, and Trade-Offs*, 222.

²⁸⁹ *Ibid.*, 221.

²⁹⁰ *Ibid.*, 246.

²⁹¹ Similar wording can be found in the case US Supreme Court, *Hope v. Pelzer*, 536 U.S. 730 (27 June 2002), 737.

²⁹² Robert M. Adams, “Religious Ethics in a Pluralistic Society”, in *Prospects for a Common Morality*, eds. Gene Outka and John P. Reeder, Jr (Princeton: Princeton University Press, 1993), 93.

absolute rights of scholars from opposed ethical theories that have long been contemplating this concept, as well as to show how their thoughts may have changed over time, especially after 9/11 attacks. An inquiry of this type can be valuable because periodic summaries of philosophical views, emphasizing the most convincing arguments, have the potential to bring the current state of affairs closer to some kind of agreement, which is pivotal for the fact that “the strength of a legal prohibition depends on the level of moral and political consensus behind it”²⁹³. Nevertheless, it also remains true that were morality sufficient to resolve all such dilemmas, the very existence of law would be unnecessary. Therefore, the thesis now turns to the realm of law.

²⁹³ Waldron, *Torture, Terror, and Trade-Offs*, 216.

II ABSOLUTE HUMAN RIGHTS AND HUMAN RIGHTS RESTRICTIONS – TWO SIDES OF THE SAME COIN

“Are all the laws but one (habeas corpus) to go unexecuted, and the government itself go to pieces, lest that one be violated?”

– Abraham Lincoln (speaking before the Congress on July 4th, 1861)

1. Human Rights Restrictions – One Notion to Rule Them All

Since the inception of international human rights law, the need to restrict certain rights in specific circumstances has been recognised. It is in the realm of human right restrictions that the state’s Janus – faced nature regarding human rights becomes most evident, since it is both the one guaranteeing human rights protection and the one enforcing their restrictions.²⁹⁴ The level and quality of human rights protection are shaped not only by their nature and scope, but perhaps even more by the extent to which they may be subject to restrictions.²⁹⁵ To this day, several different mechanisms for restrictions were formed, such as the possibility of derogations, limitations or exceptions to human rights. However, this subject is marked by inconsistent terminology, which frequently intensifies the confusion surrounding already ambiguous terms. Terms like “restrictions” and “limitations” are often used interchangeably, complicating any attempts at further clarification, in either scholarship or legal practice.

Certain scholars even tried to explain this phenomenon from the perspective of different types of human rights. For instance, Thilo Marauhn and Vera Strobel argued that “limitations and restrictions”, as they call it, primarily affect negative rights, which oblige states to refrain from interfering with individual freedoms, whereas positive rights, which necessitate active state involvement to ensure protection or fulfilment of those rights, are typically balanced against state capacities and competing interests rather than being directly subject to such constraints.²⁹⁶ It is rather unfortunate that they did not clarify what is meant under negative or positive rights, since many human rights are complex compounds composed of many layers, including both negative and positive rights, as they are understood for instance in the ECtHR’s vocabular. From the right to life, to the right to be free from torture, they encompass not only a negative aspect – the prohibition of arbitrary taking of life or the prohibition of torture, but also a set of positive duties for the state – such as the duty to conduct effective investigation. As will be shown in the part that follows, balancing is indeed inherent to all of the human rights restrictions, but not necessarily dependent on whether the right is conceptualised as a negative or a positive one. There may even be an argument for claiming that negative rights are not subject to restrictions at all, let alone

²⁹⁴ Thilo Marauhn, Vera Strobel, “Limitations and Restrictions of Rights”, in: Elgar Encyclopedia of Human Rights (eds. Christina Binder, Manfred Nowak, Jane A. Hofbauer, Philipp Janig), Edward Elgar Publishing, 2022, 430.

²⁹⁵ *Ibid*, 427.

²⁹⁶ *Ibid*.

primarily affected by them, but some conceptual clarifications are necessary before examining this claim.

Back to the terminological inconsistency, which inevitably leads to conceptual confusions, it is worth noting that, for instance, Rosalyn Higgins used “claw-back clause” for clause that allows, under normal conditions, a breach of human right for certain specified public reasons, such as those found within Articles 8, 9, 10 or 11 of the ECHR, whereas by “derogations *stricto sensu*” she referred to clause that permits the suspension or violation of human rights in situations of war or public emergency, such as Article 15 of the ECHR.²⁹⁷ According to Higgins, all these possibilities are “techniques of accommodation” and apart from “claw-back clauses” and “derogations *stricto sensu*”, they include denunciation²⁹⁸ of a treaty, reservations, articles specifying that individual rights must be exercised in conformity with the rights of others and interpretative clauses.²⁹⁹ However, she concluded that neither denunciation nor reservations are conceptually comparable with the other mentioned techniques, as the proportionality test – inherent to all accommodation clauses in one way or another – is incompatible with these institutes.³⁰⁰ Consequently, they cannot fulfil the same function of “accommodating the interests of the individual and their community”.³⁰¹

Interestingly enough, Higgins also mentioned the notion of inherent limitations, but without its explanation.³⁰² Footnoting that Francis Jacobs was not convinced by the idea of inherent limitations, favouring the perspective that only restrictions explicitly permitted by the ECHR are acceptable, she did not offer further elaboration.³⁰³ Thus, it is left unclear what exactly she had in mind under the term “inherent limitations”. On the other hand, for what is sometimes elsewhere in the literature called “inherent limitations”,³⁰⁴ she used the term “qualifying clauses”, explaining that those are clauses which offer states the opportunity “to derogate from human rights obligations”, such as for example Article 2, para. 2 of the ECHR.³⁰⁵ This is a vivid example of a terminological mishmash that is a result of simultaneous use of different notions, such as “limitations” and “derogate”, which instead of explaining, further complicates understanding of the categories at hand. Higgins underlined that “qualifying clauses” are not “interpretative clauses”, which specify certain events that shall not be considered within the scope of the obligations.³⁰⁶ To add to the ambiguity, as qualifying clauses she also listed several articles of the ECHR, for instance,

²⁹⁷ Rosalyn Higgins, *Themes and Theories* (Oxford University Press, 2009), 457–58.

²⁹⁸ Neither of the two UN Covenants contain no denunciation clause, while the ECHR and the ACHR allow denunciations only after the first five years of being a party to the treaty. See Council of Europe, *European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15*, ETS No. 5, 4 November 1950, Article 58 and Organization of American States (OAS), *American Convention on Human Rights, “Pact of San Jose”*, 22 November 1969, Article 78.

²⁹⁹ Higgins, *Themes and Theories*, 457.

³⁰⁰ *Ibid*, 490.

³⁰¹ *Ibid*.

³⁰² *Ibid*, 462.

³⁰³ *Ibid*.

³⁰⁴ Milan Paunović, Boris Krivokapić, Ivana Krstić, *Međunarodno pravo ljudskih prava* (Pravni fakultet Univerziteta u Beogradu, 2014), 67.

³⁰⁵ Higgins, *Themes and Theories*, 482.

³⁰⁶ *Ibid*.

Article 8, para. 2, Article 9, para. 2, Article 10, para. 2 or Article 11, para. 2, which were already mentioned under the term claw-back clauses.³⁰⁷ Moreover, same paragraphs were by the same author also called “permissive limitations”³⁰⁸, “exception clauses”³⁰⁹ and “accommodation clauses”³¹⁰, which further contributed to the confusion.

Relying directly on Higgins, Joan Hartman accepted the same terminology, using claw-back clauses for “specific limitations clauses in substantive articles”.³¹¹

Remarkably different, Kimberly Trapp claimed that qualifications in international human rights law lie along a spectrum or continuum,³¹² since each new qualification progresses further along the spectrum from the core of the right, as defined by its scope. She differentiated between four kinds of qualifications.³¹³

To begin with, “limited rights” refer to situations where the human rights interest does not fall under the scope of a protected right, hence exemptions³¹⁴, that represent the public interest, outline the scope of the primary rule.³¹⁵ Trapp used the term “exemptions” as opposed to “exceptions”, because the regulatory actions or use of executive power that fall under an exemption do not invoke the protected right, hence being outside of the rule, there

³⁰⁷ *Ibid*, 483. She additionally referred to Article 6, para. 1 of the ECHR, namely the part that states that “judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”, although admitting that some elements of this clause may be considered interpretative, *ibid*.

³⁰⁸ *Ibid*, 461.

³⁰⁹ *Ibid*, 486.

³¹⁰ *Ibid*, 488.

³¹¹ Joan F Hartman, “Derogation from Human Rights Treaties in Public Emergencies — A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations”, *Harvard International Law Journal* 22, no. 1 (1981): 5. However, unlike Higgins, who took the view that the purpose of derogation articles is to control state action, instead of expanding their possibilities during state of emergency, Hartman dissented claiming that the goal is to maintain, rather than restrict state’s room for manoeuvre, *ibid*, 6.

³¹² Kimberley Trapp, “Exemptions, Qualifications, Derogations, and Excuses in International Human Rights Law”, in *Exceptions in International Law*, eds. Lorand Bartels and Federica Paddeu (Oxford University Press, 2020), 305.

³¹³ *Ibid*, 306.

³¹⁴ For the difference between exemption and exception she relied on Joost Pauwelyn, “Defenses and the Burden of Proof in International Law”, in *Exceptions and Defenses in International Law*, eds. Lorand Bartels, Federica Paddeu (Oxford University Press, 2020), 88. Jorge Viñuales remarked that utilizing the right term (exemption vs. exception vs. carve — out) can carry important legal consequences for issues such as the burden of proof, the method of interpretation, the level of deference given to a respondent under a provision, and its interaction with certain referral clauses, Jorge E. Viñuales, “Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law”, in *Exceptions and Defenses in International Law*, eds. Lorand Bartels, Federica Paddeu (Oxford University Press, 2020), 67.

³¹⁵ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 306. For Trapp, similarly to James Crawford, primary rules of international law include the substantive obligations of states under customary law and treaties, while secondary rules involve state responsibility rules that allow identification of a breach of primary rules and determination of the resulting consequences, *ibid*. See also James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 16.

is no need for an “exception”.³¹⁶ For instance, she claimed that, unlike the ICCPR and the ACHR, the ECHR in some instances *a priori* established the balance between public interest and individual right.³¹⁷ In other words, for limited rights, the primary rule differentiates between scenarios where it applies and those where it does not, hence the reasoning is algorithmic – the court can only apply or not apply the primary rule.³¹⁸ She found examples of “limited rights” within the ECHR in the right to life, namely Article 2, para. 2 or the right to liberty and security, Article 5, para. 1.³¹⁹

On the other hand, according to Trapp, “qualified rights” indicate that human rights interest do fall under the scope of a protected right (the primary rule), but limitation of the right is allowed to pursue legitimate aims (such as public interest), under conditions defined within the primary rule.³²⁰ Trapp explicitly clarified that, for her, “qualified rights” are those that for Higgins are rights subject to claw-back clauses.³²¹ Such permissive limitations are necessary to pursue legitimate aims, *i.e.*, certain community interests, including protection of national security, public order, health, and morals, or the protection of the rights and freedoms of others.³²² It is up to human rights monitoring bodies to define the scope of protection by balancing conflicting interests through a proportionality assessment.³²³

“Derogations” denote situations where human rights interest falls under the scope of the protected right (the primary rule), but the obligation of a state to uphold that right can be temporary suspended, under conditions defined within a separate primary rule.³²⁴

Finally, “excuses”, according to Trapp, implies that human rights interest falls under the scope of the protected right (the primary rule), but the obligations that typically arise from a breach of that right would temporarily not be applicable, under conditions defined within a secondary rule.³²⁵

Trapp offered another possibility for systematisation of these qualifications, namely, those internal to relevant international law treaty regimes, that are subject to review by human rights treaty monitoring mechanisms, such as the first three above-described qualifications and those external to them, that are subject to mechanisms of state responsibility and courts of general jurisdiction, such as the last one denoted “excuses”.³²⁶

Jorge Viñuales considered the first two types of qualifications, namely, “limited rights” and “qualified right”, as “specific carve-outs or exemptions”, characterizing them as responses to a particular reason, like safeguarding an interest deemed of higher priority

³¹⁶ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 308. See also, Jaap Hage, Antonia Waltermann, and Gustavo Arosemena, “Exceptions in International Law”, in *Exceptions and Defenses in International Law*, eds. Lorand Bartels, Federica Paddeu (Oxford University Press, 2020), 11.

³¹⁷ *Ibid*, 308.

³¹⁸ *Ibid*, 310.

³¹⁹ *Ibid*, 308.

³²⁰ *Ibid*, 306.

³²¹ *Ibid*, 309.

³²² *Ibid*.

³²³ *Ibid*, 310.

³²⁴ *Ibid*, 306.

³²⁵ *Ibid*.

³²⁶ *Ibid*, 307. Trapp admitted that due to the doctrine of incidental jurisdiction, external qualification could be subject to scrutiny by treaty monitoring bodies.

than the objectives pursued by the norm or set of norms.³²⁷ In his contribution, Viñuales explored various methods for bypassing a rule in international law, illustrating how international law has incorporated nuance into rule application or, figuratively speaking, how it has attempted to add depth and colour to the otherwise black-and-white framework of rules and exceptions.³²⁸

For derogations, he clarified that they do not alter the specific scope of a primary norm, but merely adjust its application,³²⁹ distinguishing them from limitations and restrictions explicitly set out in certain human rights norms.³³⁰

Truth be told, international treaties also fell into the trap of terminological inconsistency. Apart from derogations, that arguably denotes a clearly distinct category, it seems that they use restrictions and limitations as synonyms. For instance, the term restriction can be found in Article 5, para. 2,³³¹ Article 12, para. 3,³³² Article 19, para 3,³³³ Article 21,³³⁴ Article 22, para. 2,³³⁵ and Article 25³³⁶ of the ICCPR. Interestingly enough, the same Article 5 of the ICCPR

³²⁷ Viñuales, "Seven Ways of Escaping a Rule," 73-76. See also Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 306.

³²⁸ *Ibid*, 66.

³²⁹ *Ibid*, 87.

³³⁰ *Ibid*, 71.

³³¹ "There shall be no **restriction** upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent."

³³² "The above – mentioned rights shall not be subject to any **restrictions** except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant."

³³³ "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain **restrictions**, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

³³⁴ "The right of peaceful assembly shall be recognised. No **restrictions** may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

³³⁵ "No **restrictions** may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful **restrictions** on members of the armed forces and of the police in their exercise of this right."

³³⁶ "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable **restrictions**:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

in its para. 1 mentions limitation,³³⁷ which is also included in the Article 18 of the ICCPR, para. 3³³⁸. Article 50 of the ICCPR peculiarly includes both limitations and exceptions³³⁹. Even the drafters of the Siracusa Principles felt the need to underline that the term “limitations” in the document includes the term “restrictions” as used in the Covenant,³⁴⁰ implying that they should be understood as synonyms, which did not add much to the clarification of these concepts.

When it comes to the ECHR, restrictions are used in Article 2, paras. 2 and 3,³⁴¹ Article 10, para. 2,³⁴² Article 11, para. 2³⁴³ and Article 16, which is even titled “Restrictions on political activity of aliens”³⁴⁴. Particularly terminologically strange is Article 18 of the ECHR, which is titled “Limitation on use of restrictions on rights”.³⁴⁵ Limitations are also part of

³³⁷ “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.”

³³⁸ “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

³³⁹ “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”

³⁴⁰ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, 28 September 1984.

³⁴¹ “No **restrictions** shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The rights set forth in paragraph 1 may also be subject, in particular areas, to **restrictions** imposed in accordance with law and justified by the public interest in a democratic society.”

³⁴² “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, **restrictions** or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

³⁴³ “No **restrictions** shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful **restrictions** on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

³⁴⁴ “Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing **restrictions** on the political activity of aliens.”

³⁴⁵ “The **restrictions** permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

Article 9, para. 2,³⁴⁶ and Article 17³⁴⁷, while exceptions are mentioned only ones, in Article 2, para. 2.³⁴⁸

As for the ACHR, restrictions can be found in Article 15,³⁴⁹ Article 16, paras. 2 and 3,³⁵⁰ and Article 30³⁵¹. Both restrictions and limitations can be found in Article 12, paras. 2³⁵² and 3³⁵³, respectively, and Article 29³⁵⁴. Limitations are also part of Article 32, para. 2³⁵⁵ of the ACHR.

Ultimately, and arguably most importantly for the topic of this thesis, along the pages of the following analysis, it will become apparent that the term “non-derogable” rights is occasionally used as synonym for “absolute” rights. An obvious example of this conflation

³⁴⁶ “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

³⁴⁷ “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

³⁴⁸ “This right may be subject to *exceptions* in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

³⁴⁹ “No **restrictions** may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.”

³⁵⁰ “The exercise of this right shall be subject only to such **restrictions** established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

The provisions of this article do not bar the imposition of legal **restrictions**, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.”

³⁵¹ “The **restrictions** that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognised herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such **restrictions** have been established.”

³⁵² “No one shall be subject to **restrictions** that might impair his freedom to maintain or to change his religion or beliefs.”

³⁵³ “Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.”

³⁵⁴ “No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress freedoms recognised in this Convention or to **restrict** them to a greater extent than is provided for herein;
- b. **restricting** the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

³⁵⁵ “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”

can be found in the following sentence “Article 15 enables all but the absolute rights in the Convention to be suspended”.³⁵⁶

With all this in mind, given the complexities of the subject matter, it is necessary to use precise and clearly defined terminology for each examined concept. By offering such taxonomy, this thesis aims to eliminate ambiguities that often arise from overlapping or imprecise notions and definitions and come up with a more structured and systematic understanding of the concepts at hand. Clear distinctions not only improve communication among scholars and practitioners and support more consistent application of those concepts, but also make analyses and arguments within the field more reliable. In this way, the thesis seeks to promote clarity and rigor in the discourse and to contribute to building a more cohesive and well-defined framework for future research.

Therefore, it is suggested that “(human rights) restrictions” should be used consistently as a *genus proximum*, that is, as a general term encompassing different legal mechanisms through which the state may lawfully interfere with the exercise of individual’s human rights.³⁵⁷

Now, it can be said that there are several types of “human rights restrictions”.

First of all, “derogation” should be understood as a category involving the full or partial suspension of a human right, which a state may invoke only in situations of public emergency. To derogate means to temporarily suspend the protection of a particular right because, in the context of an emergency, when the state is unable to uphold all the conditions necessary for the realisation of that right. In such cases, actions that would typically be considered as violations are not regarded in that way. Basically, derogation allows states, which meet specific criteria, to formally declare their inability to fully comply with certain human rights obligations, and in that way, grant them flexibility to address and manage the emergency. Nevertheless, a key feature of most derogation regimes is that some rights are non-derogable, meaning that they are insulated from its effect and must be upheld at all times.

Another type of human rights restrictions is “(human rights) limitations”, that permits the curtailment of human rights enjoyment under specific conditions during regular circumstances. This is what Higgins and Hartman referred to as claw-back clauses, while Trapp described them as “qualified rights”. Limitations are made possible through what is known as a “limitation clause”, which may be included in the provision safeguarding a particular right. In case that a limitation clause exists, states are permitted to limit the enjoyment of the right, in pursuit of a legitimate aim explicitly stated within the clause, such as the protection of national security, public order, public health and morals, or rights and freedoms of others, insofar as necessary in a democratic society (to borrow the terminology of the ECHR system). Unlike derogation mechanism, limitations can be used during both regular and irregular (emergency) times. To underline, permissibility of limitations is independent of the issue of derogability.

Next category within “human rights restrictions” could be coined “pinpoint exceptions”, as they refer to rights that include explicit, precise enumeration of their exceptions, i.e., cases

³⁵⁶ Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing, 1997), 5.

³⁵⁷ This kind of systematisation was already proposed by the author in Milica V. Matijević and Ana Zdravković, “Some Reflections on the Non-Derogable Character of Freedom of Thought, Conscience and Religion and the Concept of Absolute Human Rights,” in *Savremeno Državno – Crkveno Pravo : Uporednopravni Izazovi i Nacionalne Perspektive*, ed. Vladimir Đurić and Dalibor Đukić (Institut za uporedno pravo, 2023), 750.

in which the right does not apply.³⁵⁸ Due to the fact that the very norm defining the right, also defines situations where the right will not be applied, some author denoted this type of restrictions as “inherent limitations” or “limitations *per definitionem*”,³⁵⁹ while, as already explained, Trapp termed them “limited rights”. In other words, they are pinpointed at very specific situations which remain out of the scope of the rights, whereas limitation clauses are more open-ended and flexible.

A few words are warranted regarding the proposition to call them exceptions. As defined by Jaap Hage, Antonia Waltermann, and Gustavo Arosemena, an exception to a rule arises when the rule is applicable to a given situation, but is nevertheless not applied.³⁶⁰ As expected, conflicts of rules are a common source of exceptions, which serve as a mechanism for managing rather than avoiding them.³⁶¹ However, exceptions do not stem solely from practice; a lawmaker may also employ the rule–exception construction,³⁶² to provide some guidance to adjudicating bodies in hard cases. And this constitutes the central idea of the category of human rights restrictions at hand.

Typical for the ECHR system, pinpoint exception can be found in the provision guaranteeing the right to life, which envisage situations in which deprivation of life shall not be regarded as inflicted in contravention of ECHR, for example, when it results from the use of force which is no more than absolutely necessary.³⁶³ Similarly, the Convention prohibits forced and compulsory labour, but at the same time defines what this term does not include,³⁶⁴ *i.e.*, situations to which this very norm is inapplicable. Finally, while ECHR protects everyone’s right to liberty and security of person, it lists specific cases, *numerus clauses*, in which deprivation of liberty is not considered unlawful, provided that it follows a procedure prescribed by law.³⁶⁵

Furthermore, final possible category of “human rights restrictions”, and certainly the most controversial one, might be “implicit limitations”. Disputed both in the doctrine and practice, they are sometimes referred to as the previous category – “inherent limitations”³⁶⁶. Contended was not only whether they should be allowed but also whether

³⁵⁸ *Ibid*, 68.

³⁵⁹ *Ibid*, 67.

³⁶⁰ Hage, Waltermann, Arosemena, “Exceptions in International Law”, 19. To be completely fair, this thesis only partially accepts their account, as they actually argued that an exception is never itself a rule, but rather a conclusion based on the premise that the rule is applicable yet does not apply. They clarified how the reasons for not applying a rule could be explained through two types of defeaters: either “undercutting”, which would occur if it is said that a reason why a fact, such as the applicability of a rule, that would normally count as reason, exceptionally does not count as a reason, due to for instance, the (conflicting) purpose of the rule, or “rebutting”, which would refer to the view that the applicability of the rule still counts as a reason for its application, but it should be weighed against the reason for not applying the rule, such as the purpose of the rule. In any case, they explicitly stated that neither kind of a defeater is the exception itself. At best, a defeater is what gives rise to the exception to the rule. See, *ibid*, 26-28.

³⁶¹ *Ibid*, 20.

³⁶² *Ibid*, 19. They claim that such a construction may be used by a rule maker to create a division in the burden of proof, *ibid*, 34.

³⁶³ See Article 2 of the ECHR.

³⁶⁴ See Article 4 of the ECHR.

³⁶⁵ See Article 5 of the ECHR.

³⁶⁶ Francis Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), 198–201, as cited in Higgins, *Themes and Theories*, 463.

they should form a distinct legal concept, and the resistance against them was provided explicitly even by the ECtHR.³⁶⁷ However, due to the creative interpretation of this Court, it may be safely said that over time it employed this category of restrictions, for instance, by claiming that the right to a court is limited, even though there is no limitation clause within Article 6 of ECHR.³⁶⁸

After all, it may be useful to try to offer a theoretical framework capable of linking all these categories. In that regard, one way to explain human rights (restrictions) could also be through the Alexy's principles theory, which categorises all norms of the legal system into two groups – principles and rules.³⁶⁹ According to him, principles are norms that can be satisfied to different extents, depending on what is factually (empirically) feasible, as well as on the constraints imposed by other norms, whether they are principles or rules.³⁷⁰ Alexy also referred to principles as to “optimisation requirements”, due to their applicability being externally limited only by factual and legal possibilities, thus principles are norms that demand the highest possible level of realisation.³⁷¹

On the other hand, rules are norms that are either fully satisfied or not at all, hence, when a rule is applicable, it mandates precisely what its content specifies, leaving no room for variation in its application to a case.³⁷²

When it comes to the conflict of norms, if the norms in question are principles, the only solution can be found through balancing, by weighting one principle against another and revealing which will take priority. In other words, the question of validity will not be raised, since no exception is recognised in any norm, but the result of a conflict will be in one principle being defeated by another.³⁷³ Conversely, if rules collide, only two outcomes are possible, either an exception is acknowledged within one of the rules or one of the norms is deemed invalid.³⁷⁴

Alexy argued that all human rights follow the structure of principles, linking this to their justification, which requires providing sufficient reasons for balancing them as principles.³⁷⁵ He claimed that this approach allows for flexibility while maintaining limits to prevent arbitrariness.³⁷⁶ Essentially, it is his “Substantive Law of Balancing”, that could provide

³⁶⁷ ECtHR, *Golder v. UK*, App. No. 4451/70, Judgment of 21 February 1975, para. 44.

³⁶⁸ Similar was done regarding other Articles of the ECHR, but more on that will be presented below.

³⁶⁹ Robert Alexy, “On the structure of legal principles”, *Ratio Juris* 13, 2000: 295; See also David Duarte, “Alexy, Robert: On Rules and Principles”, *Encyclopedia of the Philosophy of Law and Social Philosophy*, eds. Mortimer Sellers, Stephan Kirste (Springer, 2023), 42.

³⁷⁰ Alexy, “On the structure of legal principles”, 295. See also, Duarte, “Alexy, Robert”, 41.

³⁷¹ Robert Alexy, *Theory of constitutional rights* (Oxford: Oxford University Press, 2002), 47. See also, Duarte, “Alexy, Robert”, 41.

³⁷² Alexy, *Theory of constitutional rights*, 48; Duarte, “Alexy, Robert”, 41.

³⁷³ Alexy, *Theory of constitutional rights*, 50; Duarte, “Alexy, Robert”, 42.

³⁷⁴ Alexy, *Theory of constitutional rights*, 49; Duarte, “Alexy, Robert”, 42. Alexy also clarified that neither principles, nor rules are definitive commands, because while applicability of principles relies on their balancing against the opposing principle, rules allow for the possibility of exceptions, Alexy, *Theory of constitutional rights*, 58.

³⁷⁵ Robert Alexy, *Law's Ideal Dimension* (Oxford University Press, 2021), 152-153.

³⁷⁶ Alexy, *Law's Ideal Dimension*, 152-153. He noted that this flexibility also allows for cultural discretion and tried to explain his account of how this flexibility is limited. For more, see Alexy, *Law's Ideal Dimension*, 152-153; Alexy, *Theory of constitutional rights*, 103.

framework for this process, stating that “the more the interference in one principle, the more important the realisation of the other principle”.³⁷⁷ Schlink, interpreting Alexy’s perspective, explained that fundamental rights function as principles that embody values and necessitate their optimisation to the fullest possible extent.³⁷⁸ However, this inevitably leads to their conflict with other fundamental rights, each requiring the maximisation of its own set of values or with other principles guiding state in achieving its objectives.³⁷⁹ Resolving such conflicts requires seeking a Pareto-optimum that accommodates both sides, and when this proves insufficient, balancing the competing principles.³⁸⁰ In this view, Alexy saw fundamental rights as the constitutional basis for the principle of proportionality, precisely because they operate as principles.³⁸¹

Be that as it may, positive (especially international) human rights law, does not fully support this approach, since there are certain rights, guaranteed under norms that resemble deontological constraints. Schlink was also aware of this actuality, noticing that when torture is prohibited under all circumstances, it remains prohibited regardless of whether it appears to be the sole means to achieving a paramountly important aim, hence this prohibition precludes any proportionality analysis.³⁸² Explaining that deontological constraints have no place within proportionality analysis, he allowed for the possibility that they may set its boundaries and define its scope from the outside.³⁸³ In other words, if a right does not allow for any kind of restriction, assessing whether a specific intrusion is proportional is meaningless, thus rights that are protected categorically exclude any restriction and cannot be subject to the proportionality test.³⁸⁴

Therefore, for Schlink it was neither helpful nor necessary to connect the principle of proportionality to the “controversial interpretation” of rights as principles.³⁸⁵ Nevertheless, he did not undermine the important function of the principle of proportionality, highlighting that it is a plausible method to determining which limitations and intrusions are permissible in regard to certain fundamental rights,³⁸⁶ as well as that it is open enough to accommodate different (conflicting) interests of state of citizens or courts and legislature.

By all means, the principle of proportionality is intrinsic to all types of human rights restrictions. From derogations, which needs to be strictly necessary for resolving the state of emergency, *i.e.*, (stringently) proportional, to limitations which must be necessary in a democratic society for pursuing a prescribed legitimate aim, *i.e.*, proportional, to pinpoint exceptions which are applicable if and only if that is absolutely necessary in one of the stipulated situations,³⁸⁷ *i.e.*, once again proportional to the goal to be achieved. When it

³⁷⁷ Alexy, “On the structure of legal principles”, 298.

³⁷⁸ Bernhard Schlink, “Proportionality”, in *Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld, Adrás Sajó (Oxford University Press, 2012), 730.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*, 722.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*, 730.

³⁸⁶ *Ibid.*

³⁸⁷ At least when it comes to the right to life in Article 2 of the ECHR.

comes to the implicit limitations, they operate completely according to the limitation clause scheme, hence proportionality to the legitimate aim is also indispensable. Although the distinction between a rule and a principle may not be immediately apparent, it inevitably becomes clear when the application reveals the need for a proportionality test.

It seems reasonable to conclude that all human rights subject to restrictions – whether derogable rights, rights containing limitation clauses, those implicitly allowing limitations, or rights permitting pinpoint exceptions – function as principles. On the other hand, all rights that do not allow for any kind of restrictions obviously function as rules, operating in either – or manner, meaning they must be applied whenever they are applicable.³⁸⁸

With this conceptual and terminological framework laid, each type of human rights restriction will now be examined in greater detail.

2. Derogations of Human Rights

In case of state of emergency, which is a particular legal regime that requires reaction from public institutions in regard to an existential crisis jeopardizing their public order,³⁸⁹ states may invoke derogation of their human rights obligations, a type of “human rights restrictions” that allows for the temporary suspension of certain rights as a response to the extraordinary crisis.³⁹⁰

For example, under ordinary conditions, states are obliged to guarantee freedom of movement, allowing individuals to travel and reside wherever they choose within the country, which means that states must refrain from arbitrary restrictions such as curfews or travel bans. However, during a public health crisis, like a pandemic, governments may find it impossible or tremendously hard to uphold these guarantees and may need to impose strict lockdowns, restrict travel, or enforce quarantines to prevent the spread of disease.³⁹¹ While such measures would typically violate the right to freedom of movement, in the context of a health emergency, they would not be treated in the same way. If the prescribed

³⁸⁸ Maybe, it could also be claimed that even rights that do not allow for restrictions operate as principles. This account would confirm Alexy’s stance and it may go as follows. Schlink argued that the proportionality analysis is a reasoning process where, *prima facie*, any argument can be made for or against the suitability or necessity of means and balance between the means and the aim, as long as that aim is legitimate, Schlink, “Proportionality”, 732. However, when it comes to non–restrictive rights, it may be said that no aim is legitimate. As a result, although they might nominally be perceived as principles – that is, as balanceable – in reality, they are not, since no aim could ever take precedence over them. But, given that this construction is purely theoretical and lacks any foundation in legal practice, it will be set aside and not further developed in this thesis.

³⁸⁹ Evan J. Criddle and Evan Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, *Human Rights Quarterly* 34 (2012): 44-45.

³⁹⁰ The Ancient Romans could be credited with establishing and utilizing emergency powers and derogation of individual rights, see Paige Tapp, “To Derogate or Not to Derogate, that is the Question: A Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights”, *International Program Papers* (2019): 119.

³⁹¹ Another illustrative example would be regarding the right to liberty and security that mandates securing judicial authorisation for detention within a designated timeframe, but during war or national emergencies, when governments encounter significant upheaval and instability, states might extend detention without judicial review for periods longer than normally permitted.

conditions for lawful derogation are fulfilled, these restrictions would be deemed permissible.

2.1. Decoding Derogations in International Law: A Theoretical Exploration

Derogation mechanisms allow states to formally acknowledge that they are temporary unable to meet their human rights obligations, giving them the flexibility in addressing crises more effectively. They offer states “time and breathing space from voters, courts, and interest groups to confront crises”³⁹². Emergency measures are seen as a swift reaction to a threat that could significantly jeopardise human rights.³⁹³ In other words, states are permitted to temporarily suspend certain rights during emergencies as means of seeking to quickly restore normal conditions and fully comply with the treaty once again.³⁹⁴ As already stated, these mechanisms are subject to strict safeguarding conditions that are designed to prevent abuse and preserve legal certainty. They are set out in “derogation clauses” and they typically require an official declaration of a public emergency, insist that any taken measure is proportionate to the crisis, and they strictly prohibit discrimination. States are also often required to notify relevant international bodies about derogating measures, which is a procedural step necessary to ensure transparency and accountability.

Deena Mohammad El-Rashed correctly recognised that opting to derogate should be employed only when the state’s ordinary powers are insufficient to address the emergency.³⁹⁵ What is more, human rights restrictions actually allow for human rights commitments to be more than just a dead letter, since these kinds of enforcement mechanisms exist to ensure that states go beyond symbolic recognition and truly implement human rights in practice.³⁹⁶ Putting it more poetically, she stated that at the core of international human rights law is the intent to guarantee basic level of protection for all human beings, everywhere and at all times.³⁹⁷

According to Trapp, effects of derogation are not different compared to what she called “exception to a qualified right”³⁹⁸ (termed in this thesis as limited rights), as both create a space for manoeuvre for the state that would not otherwise exist, but mechanisms are not the same.³⁹⁹ Specifically, with derogations, the primary rule remains in place, prohibiting

³⁹² Emilie M. Hafner-Burton, Laurence R. Helfer, Christopher J. Farris, “Emergency and Escape: Explaining Derogations from Human Rights Treaties”, *International Organization* 65 (2011): 673, 675.

³⁹³ Vassilis P Tzevelekos, Kanstantsin Dzehtsiarou, “Editorial - Normal as Usual? Human Rights in Times of Covid-19”, *European Convention on Human Rights Law Review* 1 (2020): 144.

³⁹⁴ Jean Allain, “Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law”, *European Convention on Human Rights Law Review* 11 (2005): 481.

³⁹⁵ Deena Mohammad El-Rashed, “Derogation in Time of Emergency: An Analysis of Counter – Terrorism Measures in France and Their Impact on Human Rights”, *Florida Journal of International Law* 30, no. 1 (2018): 3.

³⁹⁶ *Ibid*, 7.

³⁹⁷ *Ibid*, 4.

³⁹⁸ For the sake of reminder, Trapp listed Article 9, paragraph 2 of the ECHR as the provision permitting limitations on the freedom of thought, conscience, and religion, thus constituting an exception to a qualified right, Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 309.

³⁹⁹ *Ibid*, 313.

the relevant government action, but the obligation to adhere to that rule is temporarily suspended due to the derogation.⁴⁰⁰ By contrast, in the case of an “exception to qualified rights”, any regulatory or executive action falling within the scope of the exception is not prohibited, as the entire evaluation occurs within the framework of the substantive primary rule defining the right.⁴⁰¹ Derogations, however, operate as an “internal/external qualification”, remaining internal to the human rights system (and thus still a primary rule) while existing externally to the specific primary rule (right) in question.⁴⁰² Even when states derogate from their obligations, they remain within the framework of the human rights regime.⁴⁰³ This is because the regime itself permits derogation, provided that the measures comply with its established conditions, do not infringe upon non-derogable rights, and remain fully subject to scrutiny under the applicable human rights framework.⁴⁰⁴

Another difference Trapp accurately identified is a temporal one. Government action within the scope of what she denoted as “exceptions” can persist indefinitely as long as the balance of interests remains unchanged.⁴⁰⁵ In the case of derogations, measures are designed as temporary means to address specific crises.⁴⁰⁶ However, she acknowledged that this distinction risks becoming more theoretical than practical, given the post-9/11 tendency of states to govern under the assumption of a constant state of emergency, as already described in the preceding chapter of this thesis.⁴⁰⁷

In Evan J. Criddle’s interesting account on the nature of derogation, it is claimed that international human rights law allows states to invoke “the life of the nation” or the “independence” or “security” as a trump card that will override certain human rights claims and derogation enables them to adjust their legal obligations in situations where their (individualistic) existential interests conflict with their (altruistic) legal duties toward their populations.⁴⁰⁸ Clarifying that while derogation might appear to grant states the right to prioritise self-preservation, he admitted that this view lacks substantial support.⁴⁰⁹ It can hardly be accepted that states could use derogation purely as a tool for self-preservation, without upholding their duties to respect, protect and fulfil human rights, hence the “life of the nation” should be interpreted in terms of human interests, rather than specific interest of the state.⁴¹⁰ In essence, it could be said that derogation embodies a tension between

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, 314.

⁴⁰⁴ Similar argument was also given by Trapp, *ibid.*

⁴⁰⁵ *Ibid.*, 313.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Evan J. Criddle, “Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference,” in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 45. Criddle accepted Duncan Kennedy’s differentiation between individualistic and altruistic legal regimes, see Duncan Kennedy, “Form and Substance in Private Law Adjudication”, *Harvard Law Review* 89 (1976): 1685, 1714–1724.

⁴⁰⁹ Criddle, “Protecting Human Rights During Emergencies”, 45.

⁴¹⁰ *Ibid.*

human rights and collective interests of the community, hence treaties were factually required to address the need for suspension of human rights in times of crises.⁴¹¹

In a comparable manner, James W. Nickel understood it as state's "right to derogate", explaining that this treaty-based right permits the unilateral modification of legal duties through designated procedure, but still remains a highly qualified right, due to the several reasons.⁴¹² It applies solely to severe national emergencies, requiring that derogating measures are strictly necessary to address and resolve the emergency, while aligning with the state's other obligations under international law, respecting non-derogable rights and being followed by official notification regarding the derogation.⁴¹³

The fact that derogations are subject to external review represents an important safeguard, not only when states falsely claim an emergency or exploit the right to derogate in order to achieve political goals, but even when states operate *bona fide*, because they may misinterpret the limits of their power to derogate or impose measures that exceed what the situation demands.⁴¹⁴ Permitting states to invoke derogations not only confirms the acceptance and applicability of the human rights regime but also ensures accountability through oversight by international courts and monitoring bodies, which is arguably a greater benefit compared to denying the possibility of derogations altogether.⁴¹⁵

Surely, a major drawback of derogation is exposing derogable human rights to potential violations under the guise of exceptional circumstances.⁴¹⁶ Even though, as Gerald L. Neuman remarked, states that abuse the right to derogate are often less concerned with court's decisions, which makes external political pressures crucial in such cases,⁴¹⁷ this does not at any rate diminish the importance or usefulness of the derogation concept. Truth be told, countries all around the world, from Sudan⁴¹⁸ to UK⁴¹⁹, have invoked states of emergency to address both real and anticipated crises, ranging from armed conflicts and rebellions to public unrest, terrorism, economic instability, pandemics, and natural catastrophes, which often undermined legal safeguards and opened the door to extensive human right violations.⁴²⁰ In words of Emilie Hafner-Burton, states most likely to formally derogate for longer periods are those with "stable democracies" and judicial systems featuring strong executive oversight - countries equipped with mechanisms to ensure

⁴¹¹ Hartman, "Derogation from Human Rights Treaties in Public Emergencies", 11.

⁴¹² James W. Nickel, "Two Models of Normative Frameworks for Human Rights During Emergencies," in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 62.

⁴¹³ *Ibid.* He highlighted that the ECHR system fails to address issues like incompetence and unpreparedness of state agents, causing preventable deaths and damage, *ibid.*, 63.

⁴¹⁴ Gerald L. Neuman, "Constrained Derogation in Positive Human Rights Regimes," in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 27. External scrutiny is especially important, given that, as some claim, during emergencies, courts frequently reduce the rigor of judicial review, deferring to the executive branch and allowing it to bypass ordinary legal restraints, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 3.

⁴¹⁵ Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 320.

⁴¹⁶ Neuman, "Constrained Derogation", 27.

⁴¹⁷ *Ibid.*

⁴¹⁸ Ahmed S. Al-Shani and Ahmad Alawad Sikainga, "Conflict in Darfur", *Encyclopedia Britannica*, 4 December 2024, <https://www.britannica.com/place/Sudan> (accessed 23.3.2025).).

⁴¹⁹ Jeff Wallenfeldt, "the Troubles", *Encyclopedia Britannica*, 26 Nov 2024, <https://www.britannica.com/event/The-Troubles-Northern-Ireland-history> (accessed 23.3.2025).

⁴²⁰ Criddle and Fox-Decent, "Human Rights, Emergencies, and the Rule of Law", 45.

accountability to their treaty obligations, whereas states with weak judicial systems or those where political leadership is not easily replaceable are more prone to violating international treaties outright rather than utilizing formal mechanisms.⁴²¹ On top of that, Hartman also had a point when objected that international monitoring bodies do not conduct *ex officio* reviews of derogating measures, not even in the face of potential widespread violations, but are activated only by (possibly) delayed derogation notifications and reporting processes.⁴²² She went even further and criticised the absence of effective sanctions for states that violate their treaty obligations, including derogation mechanism, given that state of emergency often urges governments to prioritise safeguarding national institutions or maintaining a specific regime, rendering it indifferent to negative publicity, which is the primary enforcement mechanism of international bodies.⁴²³

While all of this is undoubtedly true, the existence of a derogation mechanism provides a crucial framework for analysing, evaluating, and, to some extent, regulating these exceptional situations. Without such a legal regime, managing or scrutinizing states' actions during emergencies would be significantly more challenging, if not entirely unattainable. This structured approach ensures that even in times of crisis, there is accountability and oversight, which would be inconceivable in the absence of such a system. Although monitoring bodies, such as the ECtHR, cannot directly influence an ongoing crisis, they can still have a role in discouragement, as states are aware that their actions will later be examined, hence they act as a persistent "shadow" in the minds of national decision-makers and judges.⁴²⁴ Finally, Criddle pointed out that there are valid reasons for the international community to continue using "open-textured" standards to govern derogation, due to the fact that by allowing states to determine when and how to derogate from their international obligations, international human rights law places primary responsibility on states to decide what measures are necessary to safeguard and uphold human rights during state of emergency.⁴²⁵ In other words, flexible standards enable states to create a strategy specifically tailored for the emergency they are facing, which is why the derogation mechanism should be maintained, together with granting a healthy margin of appreciation regarding their derogating measures.⁴²⁶

Despite the fact that derogation do not entirely prevent human rights violations during emergencies, it is hardly imaginable what would be the alternative for the state in the absence of derogation regime.⁴²⁷ What derogation offers are measures specifically tailored for the state of emergency that, as already stated, allows them to continue to adhere to the particular human rights regime.⁴²⁸

To leave no stone unturned, Neuman questioned whether public international law already offers some other legal instruments that could be used by states during the state of

⁴²¹ Emilie M. Hafner-Burton, Laurence R. Helfer, Christopher J. Farris, "Emergency and Escape: Explaining Derogations from Human Rights Treaties", in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge University Press, 2016), 86.

⁴²² Hartman, "Derogation from Human Rights Treaties", 2.

⁴²³ *Ibid.*

⁴²⁴ Tzevelekos, Dzehtsiarou, "Editorial - Normal as Usual?", 144-145.

⁴²⁵ Criddle, "Protecting Human Rights During Emergencies", 54.

⁴²⁶ *Ibid.*, 54.

⁴²⁷ Neuman, "Constrained Derogation", 17.

⁴²⁸ *Ibid.*, 21.

emergency.⁴²⁹ The one especially worth zooming in is denunciation, which denotes a unilateral act by which a party seeks to terminate its participation in a treaty.⁴³⁰ Despite the fact that denunciation is a well-established institute of public international law, the field of human rights law is of specific nature, thus, it comes as no surprise that the ICCPR does not include an option of denunciation. The ECHR and the ACHR do have denunciation clauses, but both impose a temporal limitation, namely, an obligation to notify Secretary General about the denunciation and they lay down a period after the notification when the denunciation would become effective. In other words, denunciation will produce effect six months in case of the ECHR,⁴³¹ and one year according to the ACHR,⁴³² after the state notify on its intention to denounce the treaty. That said, prescribed deadline leads to the delayed effect, thereby reducing the usefulness of a denunciation, particularly in addressing short-term emergencies.⁴³³ In addition, with the growth of regional integration in Europe, denunciation from the ECHR would entail significant political and economic consequences for Member States,⁴³⁴ and the same could be said for other regional human right systems.

For the topic of denunciation in regard to the ECHR, the *Greek Case* is particularly interesting. After the *coup d'état* that was undertaken by military officers in 1967 and resulting suspension of certain articles of the Constitution guaranteeing human right,⁴³⁵ Norway, Sweden and Denmark submitted identical complaints to the Commission, accusing the Greek government of breaching the ECHR and claiming that conditions for lawful derogation under Article 15 were not fulfilled.⁴³⁶ The European Commission of Human Rights⁴³⁷ issued a report in which, *inter alia*, it determined that the Greek government has failed to convince the Commission, through the evidence presented, that a public emergency threatening the life of the nation did exist at relevant time, hence that Article 15 was not applicable.⁴³⁸ The reaction of Greece was to denunciate from the Council of Europe and the ECHR, but in 1974 it reinstated its membership, following the return of democratic governance.⁴³⁹ James Becket took a stance that by releasing the report, the ECHR

⁴²⁹ *Ibid*, 28.

⁴³⁰ Anthony Aust, "Treaties, Termination", *Max Planck Encyclopedia of Public International Law*, 2006, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1491> (accessed 23.3.2025). Aust underlined that when it comes to multilateral treaties, more appropriate term would be withdrawal, but for the sake of consistency in this thesis, denunciation will be continuously used.

⁴³¹ Article 58 of the ECHR.

⁴³² Article 78 of the ACHR.

⁴³³ Neuman, "Constrained Derogation", 28.

⁴³⁴ *Ibid*, 29.

⁴³⁵ James Becket, "The Greek Case Before the European Human Rights Commission", *Human Rights*, American Bar Association (1970): 93.

⁴³⁶ *Ibid*, 94-95.

⁴³⁷ The Commission was the body of the Council of Europe that in the period from 1953–1998 determined admissibility of the petitions, facilitated friendly settling of cases and prepared a report detailing the established facts and providing an opinion on whether a violation had taken place, for more, see <https://www.refworld.org/document-sources/council-europe-european-commission-human-rights> (accessed 23.3.2025.)

⁴³⁸ *Ibid*, 108.

⁴³⁹ European Court of Human Rights, "Strengthening democracy" - Ceremony organised by the Presidency of the Hellenic Republic and the Hellenic Parliament – The inter-State applications against the Greek dictatorship as an *acquis* of the ECHR case-law - Speech by Marko Bošnjak, Athens, 2024, 4,

system compelled the denunciation of a regime that refused to adhere to the Convention's principles.⁴⁴⁰ Notwithstanding the fact that the outcomes of derogation are to some extent comparable to that of denunciation,⁴⁴¹ it remains undisputable that denunciation could be used as an alternative to the derogation only by non-democratic systems as part of misapplication and malicious use of the ECHR or any other human rights treaty.

Apart from denunciation, institutes that could also be taken into consideration are the state of necessity and (exclusionary) *lex specialis*.⁴⁴²

To begin with, Article 25 of the ARSIWA does not allow invoking necessity as a ground for precluding the wrongfulness of an act that "seriously impair[s] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole".⁴⁴³ It could be argued that respecting human rights obligations, due to their growing prominence in international law, constitutes a vital interest of the entire international community,⁴⁴⁴ hence, that this institute could not be used as an alternative to the derogation. Nonetheless, the logic of necessity was certainly known to the drafters of derogation mechanisms within the human rights documents, hence it has probably to some extent influenced its conceptualisation.⁴⁴⁵

Another possible difference could be the way in which these institutes operate regarding their effect on the act that would otherwise constitute a breach of international obligation. The state of necessity is a ground for precluding the wrongfulness of an act not in conformity with an international obligation, meaning that it actually eliminates one of the conditions for the responsibility of the state.⁴⁴⁶ On the other hand, Hartman noted that it is not entirely clear in the doctrine whether the right to derogate serves to excuse a breach of treaty obligations or, by suspending those obligations, prevents a breach from occurring in the first place, even though the result is the same. Namely, from the perspective of law, there is no breach.⁴⁴⁷ Similarly, Jaap Hage, Antonia Waltermann, and Gustavo Arosemena recognised at least two ways to explain how derogation operates at a conceptual level. They favoured the one insisting that derogation prevents any conflict between a treaty rule and

<https://www.echr.coe.int/documents/d/echr/speech-20241031-bosnjak-presidency-greece-eng> (accessed 15.06.2025).

⁴⁴⁰ Becket, "The Greek Case", 113.

⁴⁴¹ Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 314.

⁴⁴² Neuman, "Constrained Derogation", 28. Another option that Neuman mentioned is modification of certain human rights obligations by the UN Security Council under Chapter VII of the UN Charter. However, despite the fact that this could be perceived as one way to restrict human rights of an individual, it is not a mechanism that is in any way at disposal of the state and that the state can use at its own discretion.

⁴⁴³ Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 324.

⁴⁴⁴ *Ibid.* According to the Article 40, para. 2 of ARSIWA, "a breach of [such] an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation", International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), 2001. Trapp still accepted that there are some extraordinary situations, especially regarding the extraterritorial human rights limitations, where the state of necessity would be applicable. For more, see Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 325.

⁴⁴⁵ Hartman, "Derogation from Human Rights Treaties", 13.

⁴⁴⁶ Article 25 of ARSIWA. This stands on the assumption that the conditions for state's responsibility are that an act or omission is attributable to the state under international law, that it constitutes a breach of an international obligation of the state and that there are no circumstances precluding wrongfulness.

⁴⁴⁷ Hartman, "Derogation from Human Rights Treaties", 13.

the rule on the basis of which the measures are taken, since it renders the treaty rule inapplicable while the derogation is in force.⁴⁴⁸ Put differently, derogation temporarily suspends applicability of a potentially conflicting rule, thereby eliminating the possibility of conflict.⁴⁴⁹ Alternatively, it could also be said that derogation involves creating a temporary exception to the derogated rule.⁴⁵⁰ The derogated rule remains applicable, but it should (at this place it may be more appropriate to use the term “can”) temporarily not be applied, thus derogation does not prevent rule conflicts but rather serves as a mechanism for managing them.⁴⁵¹ This latter explanation may be the most suitable, as derogation serves only as an option for the state. Even when the state chooses to activate this mechanism and makes the appropriate notification, it does not necessarily mean that it will certainly derogate, nor that it will derogate from all enumerated rights or for the entire period of crisis. Rather, activation of this mechanism only indicates the possibility for a state to derogate if emergency demands it, so that it can stay within its treaty obligations.

In any case, this conceptual difference is practically relevant since it can affect how the monitoring bodies structure their opinions in a derogation case. For that reason, Hartman reminded that Sir Gerald Fitzmaurice criticised the ECtHR for addressing the issue at hand under Article 5 before examining Article 15, since for him effects of Article 15 operate “retrospectively”, in order to prevent breaches, rather than merely excuse them.⁴⁵² Hartman pointed out that the Court’s approach may reflect a preference for resolving cases on the simpler grounds of firstly examining substantive violations and, in case that no violation was established, to conclude the examination at that stage, thereby avoiding the more complex issues that Article 15 would raise.⁴⁵³ Only if the ECtHR could not establish with certainty that no violation had occurred would it actually proceed to examine Article 15.

Finally, the concept of *lex specialis* can be interpreted as referring to a specialised body of law that replaces the usual (general) standards of a human rights treaty,⁴⁵⁴ and it is frequently used to describe the interplay between international humanitarian law and

⁴⁴⁸ Hage, Waltermann, Arosemena, “Exceptions in International Law”, 23.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.* Joost Pauwelyn had a different account that can be used for explaining how derogation works, which boils down to the distinction between “exceptions” and “exemptions”. In case of “exception”, both rule and exception are applicable to a specific set of facts, thus, the rule, at least initially, may be violated. Conversely, the exemption removes a particular situation from the rule’s scope. The rule governs one set of situations, while the exemption applies to another set of situations, thus they never apply to the same facts. Therefore, it needs to be proven that the alleged violation pertains to the applicable rule and that the exemption does not apply, or *vice versa*. As an example of “exemption”, Pauwelyn mentioned *lex specialis* as a form of a “priority rule”, since in that situation both rules are valid in the specific case, but only one of them is applied. Now, this distinction is relevant for the court’s reasoning, since in the case of exemptions, the adjudicating body needs to analyse whether exemption applies or not in the first place, since if it does, the general rule is not applicable. It would only consider whether the general rule has been violated after determining that the exemption, such as *lex specialis*, does not apply. See Pauwelyn, “Defenses and the Burden of Proof”, 97-99. Even though derogation mechanism is by its nature closer to “exceptions”, firm conclusion cannot be deduced from the reasoning of international human rights monitoring bodies. After all, Pauwelyn admitted that the distinction is not uncontested, as well as that in practice of international tribunals it often plays little or no role, *ibid.*, 98.

⁴⁵² Hartman, “Derogation from Human Rights Treaties”, 13, see also ECtHR, *Ireland v UK*, App. No. 5310/71, Judgment of 18 January 1978, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 42.

⁴⁵³ *Ibid.*

⁴⁵⁴ For a slightly different account see Neuman, “Constrained Derogation”, 28.

international human rights law.⁴⁵⁵ Given that the nature of this relationship is still under debate, as well as that the HRC has also dismissed any kind of robust interpretations of *lex specialis*,⁴⁵⁶ this does not seem as a reliable response to the broad concept of state of emergency.

In light of the foregoing, it appears that, at this stage in the development of international human rights law, derogation remains the only viable solution for addressing exceptional situations of public emergency. Its full potential should therefore be utilised to ensure the highest possible level of human rights protection under the given circumstances. The following section will thus examine the conditions that must be met for derogation measures to be considered lawful.

2.2. Derogation Clauses – An Easy Way Out?

The right of state to derogate, or in other words, an authorisation to waive certain human rights obligations during the state of emergency, is guaranteed by the so-called “derogation clause”, that can be found in most of the human rights treaties.

In words of Emanuele Sommario, such a clause absolves a state from international responsibility for not fully upholding its treaty obligations, as long as it adheres to specific substantive and procedural requirements when exercising this right.⁴⁵⁷ The treaties needed to be flexible and offer states experiencing severe emergencies a mechanism to temporarily loosen their obligations without jeopardizing their status as States parties.⁴⁵⁸ The derogation provisions function as a “pause” button during national emergencies, ensuring that states cannot reinterpret (or misinterpret) rights during the emergency.⁴⁵⁹

Reflecting a delicate compromise between safeguarding individual rights and addressing national needs during the state of emergency,⁴⁶⁰ architecting the derogation clause was by no means an easy task.

⁴⁵⁵ International Committee of the Red Cross, “How does law protect in war?” (Online Casebook), https://casebook.icrc.org/a_to_z/glossary/lex—specialis (accessed 9.12.2024).

⁴⁵⁶ Even though it acknowledged the interpretive value of international humanitarian law, stating that “while in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”, HRC, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11. See also Neuman, “Constrained Derogation”, 28.

⁴⁵⁷ Emanuele Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters,” in *International Disaster Response Law*, ed. Andrea de Guttery, Marco Gestri, and Gabriella Venturini (T.M.C. Asser Press and Springer, 2012), 327.

⁴⁵⁸ Nicole Questiaux, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15 (27 July 1982), para. 37.

⁴⁵⁹ Hafner-Burton, Helfer, Farris, “Emergency and Escape”, (2011): 674.

⁴⁶⁰ *Ibid*, 2.

2.2.1. *The Making of Derogation Clause*

The first such clause to enter into force was Article 15 of the ECHR, named “Derogation in time of emergency”, which in para. 1 states:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

The issue of derogation arose early during the drafting of the ECHR, but the process of creating it was far from straightforward. Irish delegate highlighted the need to safeguard minorities from abuses like those under Northern Ireland’s Special Powers Act, while UK delegate joined by claiming that it was recognised in all human rights declarations that community safety takes precedence during emergencies.⁴⁶¹ There were also some objections against allowing any kind of restriction of rights, in the claims that the state violating human rights could always try to find an excuse to derogate.⁴⁶² In any event, a divide quickly emerged between those advocating precise definitions of rights and limitations and those preferring a general approach like the one used in the Universal Declaration.⁴⁶³

Article 29 of the Universal Declaration contains a general limitation clause, stipulating that:

“1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”⁴⁶⁴

It is interesting that the formulation from the para. 1 of the Article 29 was adopted unanimously, thus it emerged from a remarkable collaborative effort, safeguarding the UDHR from critics who argue that contemporary understanding of human rights is overly focused on individualism and alienation from the society as a whole.⁴⁶⁵ What is more, the whole of Article 29 was adopted unanimously by forty-one votes against none, with only one abstention,⁴⁶⁶ indicating that the need for such a clause was undisputable unified standing of all nations.

⁴⁶¹ Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. I (The Hague: Martinus Nijhof, 1975), 104, as cited in Hartman, “Derogation from Human Rights Treaties”, 4. For more details on preparatory works, see remarkable contribution of Hartman, who discussed it in detail.

⁴⁶² Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. II (The Hague: Martinus Nijhof, 1975), 138, as cited in Hartman, “Derogation from Human Rights Treaties”, 4.

⁴⁶³ Council of Europe, *Collected Edition of the Travaux Préparatoires*, vol. I, 178.

⁴⁶⁴ UN General Assembly, Resolution 217A (III), *Universal Declaration of Human Rights*, A/RES/217(III), (1948).

⁴⁶⁵ Johannes Morsink, *Article by Article – The Universal Declaration of Human Rights for a New Generation*, (University of Pennsylvania Press, 2022), 181.

⁴⁶⁶ *Ibid*, 184.

A general limitation clause is also found in another treaty,⁴⁶⁷ namely Article 52 of the EU Charter of Fundamental Rights, which was inspired by and heavily relies on the ECHR. It provides that:

“1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

The official Explanations Relating to the EU Charter clarified several points regarding this provision. First of all, “the purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation”, with the first paragraph dealing with the arrangements for the limitation of rights and using phrases based on the case-law of the Court of Justice, such as those that “it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights”.⁴⁶⁸ Remarkably, the last paragraph is intended to ensure the necessary consistency between the EU Charter and the ECHR by establishing the rule that, “in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR”.⁴⁶⁹ Moreover, it was clarified that “this means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union”.⁴⁷⁰

The EU Charter does not affect the possibilities of Member States to avail themselves of derogation clause included in Article 15 ECHR, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in the relevant provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union.⁴⁷¹

⁴⁶⁷ Marauhn, Strobel, “Limitations and Restrictions of Rights”, 428.

⁴⁶⁸ *Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union*, 2007/C 303/02 (2007), 32. See also CJEU, Judgment of 13 April 2000, Case C-292/97, para. 45.

⁴⁶⁹ *Explanations Relating to the Charter of Fundamental Rights*, 32-33.

⁴⁷⁰ *Ibid*, 33.

⁴⁷¹ *Ibid*.

Therefore, it can be said that the EU Charter leaves it to the Member States and their national legislation to establish the framework for human rights restrictions, while requiring from them to align closely with the ECHR. Consequently, all standards developed under the ECHR will be applicable to the context of the EU Charter, hence Charter will not be separately analysed within the thesis.

Back to the drafting of the ECHR, the Committee of Experts, formed by the Committee of Ministers, was assigned the task of assessing the need for a derogation clause and after analysing drafts prepared by the United Nations,⁴⁷² they concluded that a general limitation article rendered a specific derogation clause unnecessary.⁴⁷³ However, the UK expert proposed revising the instrument to include a derogation clause similar to the UN's draft of the Article 4.⁴⁷⁴ Later, the UK also suggested adding limitation clauses for several substantial articles, such as public trial, religion, expression, assembly, and association.⁴⁷⁵ While the experts agreed on the need for limitation clauses, they were once again divided on whether to adopt precise definitions or general enumeration and being unable to resolve this disagreement, they referred the decision to the Committee of Ministers.⁴⁷⁶ In 1950, after all this ping-ponging, the Ministers adopted a draft version and presented the ECHR for signature on November 4, 1950.⁴⁷⁷

The ICCPR also has its own derogation mechanism, namely Article 4,⁴⁷⁸ whose para. 1 reads as follows:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Much like the ambiance in which the ECHR's derogation clause was crafted, the drafters of the ICCPR also faced disagreements regarding the precise form of the clause. On the one hand, the UK advocated for the specific formulations,⁴⁷⁹ whereas the United States preferred

⁴⁷² It should be taken into account that the Commission on Human Rights appointed the Drafting Committee for the ICCPR in 1947 and it was already drafted in the early 1950s, so the makers of the ECHR could consult derogation clause contained in Article 4 of the ICCPR. That they actually relied on it is obvious from various reports, see for instance European Commission of Human Rights, *Preparatory Work on Article 15 of the European Convention on Human Rights*, Information document prepared by the Secretariat of the Commission at the request of the President of the Commission, DH (56) 4 (22 May 1956), 3.

⁴⁷³ Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. III (The Hague: Martinus Nijhoff, 1975), 28, as cited in Hartman, "Derogation from Human Rights Treaties", 5.

⁴⁷⁴ *Ibid*, 190.

⁴⁷⁵ *Ibid*, 280-288.

⁴⁷⁶ Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. IV (The Hague: Martinus Nijhoff, 1975), 56, as cited in Hartman, "Derogation from Human Rights Treaties", 5.

⁴⁷⁷ The Conference of Senior Officials, which was mandated with finalizing the draft, changed the derogation clause by replacing "threatening the interests of the people" with "threatening the life of the nation", Council of Europe, *Collected Edition of the Travaux Préparatoires*, vol. IV, 280.

⁴⁷⁸ Articles of the ICCPR do not have titles.

⁴⁷⁹ United Nations Economic and Social Council, Commission on Human Rights, *Text of Letter from Lori Dukeston, the United Kingdom representative on the Human Rights Commission, to the Secretary – General of the*

a single general limitation clause, stating that the treaty should stress rights, not restrictions (original term used in the report is “limitations”), that no consensus would ever be reached regarding the particular exceptions to each right and that drafters would need to consider each individual limitation separately.⁴⁸⁰ Illustrative of this position is also the stance of the Soviet representative advocating for the least possible restriction on rights and emphasizing that “the Commission should not become a champion of limitations of human rights; while it was easy to limit human rights, it was difficult to do so without destroying them”.⁴⁸¹

Since the issue could not be resolved, in 1948 the Drafting Committee forwarded both the United Kingdom’s specific draft and the United States’ more general proposal to the Commission on Human Rights for further consideration.⁴⁸²

Once specific limitations were added to numerous articles, the general limitation clauses were removed,⁴⁸³ and Article 4 reached its final form in which it was forwarded to the General Assembly in 1954.⁴⁸⁴ In conclusion, the whole negotiating process was focused on achieving enough precision in the derogation clause to allow emergency measures while preventing it from becoming a mere “escape clause”.⁴⁸⁵

The drafters of the American Convention on Human Rights, who began work in earnest in the 1960s, had the benefit of earlier-drafted human rights treaties and in a manner akin to its predecessors composed a rather similar derogation clause which in Article 27, para. 1, titled “Suspension of Guarantees” stipulates:

United Nations, U.N. Doc E/CN.4/AC.1/4 (5 June 1947), 7. Tapp noted that UK and France were worried about the impact of fully suspending the Covenant, particularly if a State lacked the means to respond effectively to a crisis, Paige Tapp, “To Derogate or Not to Derogate, that is the Question: A Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights”, *International Program Papers* (2019), 122.

⁴⁸⁰ United Nations Economic and Social Council, Commission on Human Rights, Drafting Committee, *Second Session, Twenty-Second Meeting*, U.N. Doc E/CN.4/AC.1/SR.22 (11 May 1948), 3-4. Interestingly enough, Yugoslavia emphasised the moral impact of the treaty, which would be diminished if restrictions were spotlighted, United Nations Economic and Social Council, Commission on Human Rights, *Report of the Working Party on the International Covenant on Human Rights*, U.N. Doc. E/CN.4/56, (11 December 1947), 3-4.

⁴⁸¹ Delegate Pavlov from USSR, see UN Economic and Social Council, Commission on Human Rights, *Fifth Session, Summary Record of the One Hundred and Twenty-Sixth Meeting*, UN Doc. E/CN.4/SR.126 (17 June 1949), 6.

⁴⁸² Hartman, “Derogation from Human Rights Treaties”, 8.

⁴⁸³ United Nations Economic and Social Council, Commission on Human Rights, *Summary Record of the One Hundred and Twenty-Sixth Meeting, Fifth Session*, UN Doc. E/CN.4/SR.126 (17 June 1949), 3. During the negotiations of both the ICCPR and the ECHR, considerable discussion arose about whether a derogation clause was essential, especially since qualified rights already included exceptions that allowed for permissive limitations aimed at safeguarding ‘national security’ or ‘public order’ and these exceptions were viewed as sufficient to address situations that could emerge during times of war or national emergency. See UN General Assembly, *Draft International Covenant of Human Rights, Annotation prepared by the Secretary-General*, UN Doc A/2929 (1 July 1955), 65. See also European Commission on Human Rights, *Preparatory work on Article 15 of the European Convention on Human Rights, Information document prepared by the Secretariat of the Commission at the request of the President of the Commission* (22 May 1956), 4-5. However, there was also the opinion, which obviously prevailed, that there may be instances of extreme danger or crisis, occurring regarding or regardless of war, where derogating from convention obligations becomes necessary to safeguard the population and preserve the nation’s existence and that such scenarios would fall outside the scope of the limitations outlined in specific articles of the covenant and could not be sufficiently addressed by a general limitations clause. United Nations, General Assembly, *Draft International Covenant*, UN Doc. A/2929, 66.

⁴⁸⁴ Hartman, “Derogation from Human Rights Treaties”, 10.

⁴⁸⁵ *Ibid.*

“In time of war, public danger, or other emergency that threatens the independence or security of a State for Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”

Notable differences between ACHR and its forerunners is that only the American Commission of Human Rights can petition the American Court of Human Rights for a review of governmental actions.⁴⁸⁶ Tapp suggested that certain interpretive distinctions and the inclusion of specific clauses give the American Convention the potential to be a more influential document,⁴⁸⁷ but concluded that the system continues to lack the measures needed to strengthen enforcement or establish clear standards for invoking derogation mechanism appropriately.⁴⁸⁸

Among the youngest regional human right treaties, African Charter of Human and People’s Rights, surprisingly does not include a derogation clause. However, the document contains numerous limitation clauses, in form of added explanations at the end of provisions guaranteeing rights, which are often called “claw-back clauses” in the literature.⁴⁸⁹

It has been suggested that the Charter’s claw-back clauses eliminated the need for a derogation clause.⁴⁹⁰ However, this may be the case only to some extent, since the purpose of the claw-back clauses, *i.e.*, limitation clauses is similar to that of derogation only in their rights restricting effect, but unlike limitation clauses, the derogation mechanism is especially tailored for the state of emergency. Unlike derogation clauses that regulate state behaviour by defining the conditions for derogation and mandating procedural steps before suspending individual rights, claw-back clauses provide limited protection, which is why they are more prone to abuse.⁴⁹¹ This is probably the reason why derogation clause is included in almost all constitutions of the countries in this continent and states frequently invoke them while declaring a state of emergency, which in effect results in suspension of rights guaranteed under the African Charter.⁴⁹²

Melkamu Aboma Tolera raised an important question concerning the absence of a derogation clause in the Charter, specifically whether its lacking implies that derogation is

⁴⁸⁶ Another one is a wider list of non-derogable rights, which will be covered in the following parts of the thesis.

⁴⁸⁷ Tapp, “To Derogate or Not to Derogate, that is the Question”, 129.

⁴⁸⁸ *Ibid*, 132. The 2004 Arab Charter on Human Rights features a derogation clause inspired by the ACHR and its extensive list of non-derogable rights overlaps with, but does not fully encompass, those in the American Convention, see Neuman, “Constrained Derogation”, 16. However, the Arab Charter on Human Rights will not be included in the scope of this analysis, primarily due to its limited ratification by a small number of states, as well as due to the fact that it contains some contentious provisions whose compatibility with other international human rights instruments is disputable. See Article 4 of League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.

⁴⁸⁹ Melkamu Aboma Tolera, “Absence of Derogation Clause under the African Charter and the Position of the African Commission”, *Bahir Dar University Journal of Law* 4, no. 2 (2014): 237.

⁴⁹⁰ R. D’Sa, “Human and People’s Rights: Distinctive Features of the African Charter”, *Journal of African Law* 29, no. 2 (1985): 76.

⁴⁹¹ Tolera, “Absence of Derogation Clause”, 242-243.

⁴⁹² *Ibid*, 230.

prohibited under the African human rights system or not.⁴⁹³ Relying on Fatsah Ouguergouz's deliberation of the same issues, it is indicated that there is no clear consensus that reveals the intention of the drafters in regard to prohibiting derogation.⁴⁹⁴

It may also be the case that by omitting a derogation clause in the ACHPR, member states simply opted not to regulate their conduct during a state of emergency, but instead rely on general international law in that regard.⁴⁹⁵ Primarily, those would be rules on termination and suspension of treaties laid down in the VCLT and rules regarding the international responsibility of states.⁴⁹⁶ However, most of those defences are not applicable to human rights treaties, such as, for instance, termination or suspension of the operation of a treaty as a consequence of its breach, as laid down in Article 60, para. 5 of the VCLT.⁴⁹⁷ Therefore, this explanation should also be rejected.

After thorough examination of the jurisprudence regarding individual communications of the African Commission on Human and Peoples' Rights, Tolera concluded that it

⁴⁹³ *Ibid*, 231. One possibly interesting angle to this question stems from the so-called "prohibitive rule principle", also known as the *Lotus* principle in international law, where the Permanent Court of International Justice confirmed the ability of sovereign states to act at their discretion (concerning jurisdiction – in this case), unless they voluntarily committed to an agreement or were explicitly restricted by international law, or in other words, that in international law everything which is not explicitly forbidden is allowed. See PCIJ, *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Ser. A, No. 10, para. 46.

⁴⁹⁴ Fatsah Ouguergouz, *The African Charter of Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff Publishers, 2003), 425.

⁴⁹⁵ *Ibid*, 427.

⁴⁹⁶ *Ibid*.

⁴⁹⁷ UN, *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, vol. 1155, p. 331 (23 May 1969). Article 60 which is titled "Termination or suspension of the operation of a treaty as a consequence of its breach" reads as follows:

" 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

provided no substantial reasoning for why derogation is deemed impossible under the African Charter, but it was highlighted in several instances that the lack of derogation clause signifies a prohibition on derogation.⁴⁹⁸ On the other hand, Commission's approach was completely different in examining state reports, revealing that it did not draw attention to the absence of a derogation clause in the ACHPR when it could, but instead sought to monitor states' measures implemented during states of emergencies.⁴⁹⁹ Hence, the Commission failed to provide consistent jurisprudence on derogation which may guide countries during the state of emergency.⁵⁰⁰

Finally, Tolera concluded that the absence of derogation clause in the Charter is simply a lacuna that turns it into "a suicidal charter unable to play a restraining function due to interpretational inflexibility".⁵⁰¹

Ultimately, it is also relevant to analyse how the absence relates to the ICCPR derogation mechanism, since most of the parties to the Charter are at the same time party to the ICCPR.⁵⁰² This holds practical significance, as African states that are parties to both the ICCPR and ACHPR, may rely on Article 4 of the ICCPR before the African Commission when facing severe crises that threaten the survival of the nation, as Egypt has already done.⁵⁰³ However, this has been to some extent overcome by the fact that the Protocol establishing the African Court on Human and Peoples' Rights allows the direct application of relevant international human rights law to disputes, provided the parties involved have ratified the instrument in question,⁵⁰⁴ making it possible for the Court to hold African states accountable for violations of the ICCPR, including Article 4, which does not have its counterpart in the African Charter.

2.2.2. Derogation Done Right – Criteria for Imposing Lawful Measures

Derogation clauses differ in certain aspects but are essentially similar in their criteria, underlying principles, and objectives. The key criteria that underpin lawful derogations will be outlined in the following section, incorporating insights from scholarly interpretations

⁴⁹⁸ Tolera, "Absence of Derogation Clause", 482. See ACommHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, Judgment of 11 October 1995, para. 21. ACommHPR, *Media Rights Agenda and Others v. Nigeria*, Comm. No. 105/93, 128/94, 152/96, Judgment of 31 October 1998, para. 67; ACommHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 and 89/93, Judgment of 15 November 1999, paras. 42 and 79.

⁴⁹⁹ Tolera, "Absence of Derogation Clause", 258.

⁵⁰⁰ *Ibid*, 261.

⁵⁰¹ *Ibid*, 282.

⁵⁰² *Ibid*, 230.

⁵⁰³ *Ibid*, 266. According to Laurent Sermet, Article 30, para. 4 of the VCLT, which regulates the application of conflicting treaties concerning the same subject matter, is not applicable in these cases, since it "does not resolve the question of this conflict of standards", and instead, should be governed by determining the most favourable standard for the protection of human rights, see Laurent Sermet, "The Absence of a Derogation Clause from the African Charter", *African Human Rights Journal* 7, no. 1 (2007): 144.

⁵⁰⁴ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Ouagadougou, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (10 June 1998), Article 7.

and case-law of international monitoring bodies, which offer practical guidance on how these criteria are applied in real-world contexts.

When? – To begin with, the existence of state of emergency is a key condition allowing for derogations from legal commitments regarding human rights. According to the Article 15 of ECHR, the state must be undergoing the time of “war or other public emergency threatening the life of the nation”.⁵⁰⁵

That is to say, no treaty explicitly defines the types of public emergencies covered by the derogation clause, likely because drafters could not foresee all potential crises that nations might encounter in the future.⁵⁰⁶ They opted to emphasise the gravity and impact of the emergency, irrespective of its type,⁵⁰⁷ meaning that state organs and monitoring bodies are the ones to assess whether a specific situation constitutes a genuine “public emergency”. The ECtHR held that each contracting state is primarily responsible for determining whether there is a public emergency and what the necessary response is, as their direct awareness of urgent needs makes them better suited than international judges to assess such things, which is why Article 15 grants them a wide margin of appreciation.⁵⁰⁸ Trapp argued that broad discretion in allowing governments to determine the existence of a derogation-triggering situation reflects judicial reluctance to interfere, partly due to the source of those determinations.⁵⁰⁹ Nevertheless, international monitoring bodies exercise oversight over states that opt to derogate and despite the broad margin of appreciation, they have occasionally criticised states for misusing emergency provisions.⁵¹⁰ After all, this is in accordance with the principle of subsidiarity and European supervision, according to which state parties have the primary responsibility to secure the rights and freedoms defined in ECHR and in doing so they enjoy a margin of appreciation,⁵¹¹ but remain subject to supervision by ECtHR and carry the burden of justifying their acts.⁵¹²

In its very first case, *Lawless v. Ireland*, ECtHR explained that the “natural and customary meaning” of the words within Article 15, para. 1 is sufficiently clear and that the meaning of “public emergency threatening the life of the nation” refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed”.⁵¹³

The *Greek case* followed the stances given in the *Lawless* case and the Commission underlined that, unlike English version, the (authentic) French text contained the notion of

⁵⁰⁵ Article 15 of ECHR.

⁵⁰⁶ Hafner-Burton, Helfer, Farris, “Emergency and Escape”, 2016, 84.

⁵⁰⁷ Sommario, “Derogation from Human Rights Treaties”, 328.

⁵⁰⁸ ECtHR, *Ireland v UK*, App. No. 5310/71, Judgment of 18 January 1978, para 207.

⁵⁰⁹ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315.

⁵¹⁰ ECtHR, *Brogan and Others v. UK*, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, Judgment of 29 November 1988, para. 58. See also Neuman, “Constrained Derogation”, 23. The IACtHR ruled that Ecuador violated Article 27 by excessively invoking emergency powers to combat crime in *Zambrano Vélez v. Ecuador*, Judgment of 4 July 2007 and HRC did it regarding Peru in *Concluding Observations on Peru*, U.N. Doc. CCPR/C/PER/CO/5 (2013), 15.

⁵¹¹ ECtHR, *Handyside v. UK*, App. No. 5493/72, Judgment of 7 December 1976, paras. 47-48.

⁵¹² ECtHR, *Murray v. UK*, App. No. 14310/88, Judgment of 28 October 1994, para. 38.

⁵¹³ ECtHR, *Lawless v. Ireland* (No. 3), App. No. 332/57, Judgment of 1 July 1961, para. 28.

imminent danger: “une situation de crise ou de danger exceptionnel et imminente qui affecte l’ensemble de la population”.⁵¹⁴ Therefore, it identified that the following elements were required for fulfilling this first condition: (1) existence of an actual or imminent emergency; (2) involvement of the whole nation; (3) which threatens the continuance of the organised life of the community; (4) that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are inadequate.⁵¹⁵

Article 4 of the ICCPR was clearly modelled after Article 15 of the ECHR, although there are some differences.⁵¹⁶ Notably, definition in Article 4 stating “public emergency which threatens the life of the nation and the existence of which is officially proclaimed” is the most precise one, offering the greatest legal certainty and comprehensiveness.⁵¹⁷ The same wording of actual and imminent, along with the elements outlined by the European Commission in the *Greek Case*, can be found in the Siracusa Principles.⁵¹⁸ Although not legally binding, these principles offer valuable guidance on specific interpretation of Article 4 of the ICCPR.

The requirement for an emergency to be “actual” or “imminent” means that states cannot invoke derogations under the ECHR based on threats that are merely “potential”, “latent” or “speculative”.⁵¹⁹

The second requirement has been loosened as it is accepted that the crisis may have a geographically limited scope while still affecting the entire population of the relevant area. For instance, in *Ireland v. United Kingdom*, the parties did not contest the existence of a state of emergency, implying that for Article 15 purposes, the term “the whole nation” effectively referred solely to several counties within Northern Ireland.⁵²⁰

⁵¹⁴ *Ibid* (French version).

⁵¹⁵ *Ibid*, paras. 28-29. See also Higgins, *Themes and Theories*, 476. Criddle remarked that even though they lack precedential weight, these criteria were widely regarded as giving the ECHR derogation framework a more rigid, rule-like character, offering clear guidance to states preparing for potential crises. Over time, however, the ECtHR has shifted towards a more flexible, standard-based approach by refining these criteria. See Criddle, “Protecting Human Rights During Emergencies”, 38.

⁵¹⁶ Higgins, *Themes and Theories*, 460. During the preparation of the ICCPR, the Soviet Union suggested changing “threatening the life of the nation” with “threatening the interests of the people” to underscore that derogations should not be used to safeguard a regime but to protect citizens’ interests, which was initially accepted, but later rejected due to vagueness, Hartman, “Derogation from Human Rights Treaties”, 9. See also UN Economic and Social Council, Commission on Human Rights, *Summary Record of the Hundred and Ninety-Fifth Meeting*, U.N. Doc. E/CN.4/SR.195 (29 May 1950), 12-18.

⁵¹⁷ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 64.

⁵¹⁸ Daniel O’Donnell, “Commentary by the Rapporteur on Derogation”, *Human Rights Quarterly* 7, no. 1 (1985): 23. See also UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985). The Siracusa Principles, adopted in 1984 by a group of 31 international law experts, were developed to analyse the permissible grounds and principles for limiting and derogating from human rights under the ICCPR, which according to the drafters represented the state of international law at the time, *ibid*, 2.

⁵¹⁹ Sommaro, “Derogation from Human Rights Treaties”, 332. See also Hartman, “Derogation from Human Rights Treaties”, 16.

⁵²⁰ ECtHR, *Ireland v. UK*, para. 205. See also Higgins, *Themes and Theories*, 477. Similar stand could be found in ECtHR, *Aksoy v. Turkey*, App. No. 21987/93, Judgment of 18 December 1996, para 70. The Paris Minimum Standards of Human Rights Norms in a State of Emergency have also endorsed this view, accepting that the emergency can affect “the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed”, Richard

Hartman suggested that it is necessary for emergency to threaten a core aspect of statehood, such as the operation of the judiciary or legislature, or the availability of essential resources.⁵²¹ The Siracusa Principles stipulate that the situation must be grave enough to pose a significant threat to “the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant”.⁵²²

Derogation measures are a last resort, enacted only when normal measures fail to address the threat, so the last requirement focuses on its impact on the population and state institutions, not its intensity.⁵²³ In that regard, it is imaginable that states more vulnerable or less prepared for disasters may more easily justify derogation, while those with preventive measures already in place may not.⁵²⁴

Finally, the measures must be, *prima facie*, suitable to reduce the threat or crisis, which does not mean that the measures at issue must be entirely successful.⁵²⁵

However, the ECtHR modified these requirements to some extent in case of *A and Others v. United Kingdom*. Following the 9/11 attacks, the UK declared a public emergency, enacted legislation allowing detention of foreign nationals posing security risks, and notified a derogation under the ECHR, which detainees later challenged before the ECtHR, arguing the emergency was not temporary.⁵²⁶ The Court modified requirements laid down in the *Greek case*, confirming the need for a more flexible, standard-based approach.⁵²⁷ It dismissed the European Commission’s view that derogation requires a threat to “institutions of government” or the state’s “existence as a political community”, stating instead that significant civilian casualties in just one area of a single city could justify emergency measures as a threat to “the life of the nation”.⁵²⁸ According to Criddle, this case merges the third and fourth requirement of the Court’s analysis into a single test — states may derogate from human rights obligations when such measures are “strictly required” to ensure basic security under the rule of law, hence a “public emergency” is not a separate legal requirement but a conclusion derived from applying strict necessity standard, meaning a crisis qualifies as a “public emergency” if derogation is essential to fulfilling the state’s duty to protect its people.⁵²⁹

The *Greek case* is also relevant for clarifying that the government was responsible for proving the existence of conditions that warrant invoking derogation clause.⁵³⁰

B. Lillich, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency”, *The American Journal of International Law* 79, no. 4 (1985): 1073.

⁵²¹ Hartman, “Derogation from Human Rights Treaties”, 16.

⁵²² UN Economic and Social Council, *Siracusa Principles*, para. 39 (b).

⁵²³ Sommaro, “Derogation from Human Rights Treaties”, 333.

⁵²⁴ Frits Kalshoven, “Assistance to the Victims of Armed Conflict and Other Disasters,” in *Assisting the Victims of Armed Conflict and Other Disasters*, ed. Frits Kalshoven (The Hague: Martinus Nijhoff, 1989).

⁵²⁵ El-Rashed, “Derogation in Time of Emergency”, 18.

⁵²⁶ ECtHR, *A and Others v. UK*, App. No. 3455/05, Judgment of 19 February 2009, para. 175.

⁵²⁷ Criddle, “Protecting Human Rights During Emergencies”, 40.

⁵²⁸ ECtHR, *A and Others v. UK*, para. 179.

⁵²⁹ Criddle, “Protecting Human Rights During Emergencies”, 40.

⁵³⁰ ECommHR, *Report of the European Commission of Human Rights on the “Greek Case”*, Yearbook, 12 (1969), p. 72, para. 154. See also El-Rashed, “Derogation in Time of Emergency”, 3 and Higgins, *Themes and Theories*, 473.

Like the ECHR and ICCPR, the ACHR framework also recognises that an emergency must be both exceptional and temporary to justify invoking the derogation clause and other international and regional bodies have followed the ECtHR's approach in assessing whether conditions warrant a state of emergency.⁵³¹ For instance, the Inter-American Commission on Human Rights has adopted the European Commission's standards, holding that an armed conflict does not justify a state of emergency unless the measures are temporary and the conflict threatens "the continued viability of the organised community as a whole".⁵³²

The IACtHR has openly expressed skepticism toward human rights derogation, acknowledging that while suspending guarantees may sometimes be necessary to address emergencies and uphold democratic values, such measures are prone to abuse if not objectively justified under Article 27 and other international instruments, which is evident in the region's history and experience.⁵³³ Given its past filled with authoritarianism and repression, the IACtHR has understandably been cautious in viewing national authorities as selfless defenders of their people during crises, hence when governments exploit emergencies to suppress dissent, the trust required for a margin of appreciation quickly erodes.⁵³⁴ In such cases, a stricter, individual-centered approach replaces deference to national decision-makers. This may explain why the IACtHR has developed a more rule-based jurisprudence than its European counterpart, including a broader recognition of human rights norms as *jus cogens*.⁵³⁵

Likewise, some argue that the lack of a derogation provision in the African Charter stems from a historical legacy of emergency power abuses in both colonial and postcolonial societies.⁵³⁶

To completely answer the question of *when*, one remarkable difference between international treaties has to be mentioned. Namely, unlike ICCPR, ECHR and ACHR explicitly mention war, apart from "(other) public emergency".

According to Marc Bossuyt, it was considered inappropriate for the ICCPR to imply the possibility of war, as the United Nations was founded with the aim of preventing it.⁵³⁷ The

⁵³¹ Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 250.

⁵³² See IACtHR, "Judicial Guarantees in States of Emergency", Advisory Opinion OC-9/87 from 6 October 1987, paras. 36, 40, requiring finite duration; IACCommHR, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L./V.II.63, doc. 19 rev. 3 (29 November 1983); Criddle and Fox-Decent, "Human Rights, Emergencies, and the Rule of Law", 48.

⁵³³ IACtHR, "Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights", Advisory Opinion OC-8/87 of 30 January 1987 Requested by the Inter-American Commission on Human Rights.

⁵³⁴ Criddle, "Protecting Human Rights During Emergencies", 53.

⁵³⁵ IACCommHR, *Roach and Pinkerton v. US*, Case No. 9647, Resolution No. 3/87 (22 September 1987), characterizing prohibition of "execution of children" as a *jus cogens* norm); cf. Frederick Schauer, "Official Obedience and the Politics of Defining 'Law'", *Southern California Law Review* 86 (2013): 1192, observing that "rules can empower criticism in ways that standards do not".

⁵³⁶ Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR", *Birkbeck Law Review* 1 (2013): 135-153.

⁵³⁷ Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987), 86. During the preparation of ICCPR, UK's delegate suggested that under general international law, states aren't strictly obligated to adhere to treaties during the war unless stated otherwise, prompting the UK to advocate for Article 4 in order to limit arbitrary human rights derogations, UN Commission on Human Rights, *Drafting Committee on an International Bill of Human Rights, Summary Record*

travaux préparatoires of ICCPR reveal that it was discussed whether referencing “national security” and “public order” alone, like in limitation clauses, failed to offer enough legal guidance during major emergencies.⁵³⁸ Nonetheless, avoiding any mention of war prevailed and led to the “head-in-the-sand attitude”, which treats war as a legal regime rather than a factual situation, contrary to the approach taken in ECHR and ACHR.⁵³⁹

It can be considered that “war” under Article 15 of the ECHR includes international and non-international armed conflicts that invoke application of international humanitarian law, covering actions both within a state’s territory and beyond it (*i.e.*, extraterritorially).⁵⁴⁰ Precise meaning of the “state of war” is yet to be constructed in the jurisprudence of the monitoring bodies, if ever, since states can always alternatively rely on a state of public emergency in such cases.⁵⁴¹

To what extent? – Some scholars noted that most instruments employ two-step analysis to examine the legality of derogation, with the first one inquiring whether the conditions are severe enough to justify declaring a state of emergency and if the answer is positive, they proceed to assess measures taken to counter the crisis.⁵⁴²

In that regard, derogation clauses indicate that derogable rights and fundamental freedoms may be derogated from “to the extent strictly required by the exigencies of the situation”. For ECtHR, “strictly required” standard is equivalent to “indispensable” and should be distinguished from the “necessary” standard inherent to qualified (limited) rights, which implies proportionality.⁵⁴³ On the other hand, HRC was unambiguous in that the principle of proportionality is also a condition for valid derogation measures, since it ensures that no matter how validly a provision of a treaty is derogated from, it will not be entirely inapplicable to the state’s conduct.⁵⁴⁴ Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted by the International Law Association in 1984 and aimed at reflecting consensus regarding a set of minimum standards governing the declaration and administration of states of emergency within ECHR, ICCPR and ACHR,

of the 8th Meeting, U.N. Doc. E/CN.4/AC.3/SR.8 (1947). On the other hand, Daniel Patrick O’Connell argued that this might not accurately reflect modern international law and warned that the effect of war on treaties remains an obscure and unclear subject, Daniel Patrick O’Connell, *International Law* (London: Stevens, 1965), 286. See also Higgins, *Themes and Theories*, 461.

⁵³⁸ Higgins, *Themes and Theories*, 461.

⁵³⁹ *Ibid.* Arab Charter does also not mention war in its derogation clause, see Article 4 of Arab Charter.

⁵⁴⁰ David John Harris, Michael O’Boyle, Edward P. Bates, and Carla M. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2018), 815. It remains unclear whether derogations are applicable in regard to the state’s actions in an extraterritorial context and under which conditions, *ibid.*, 814. ECtHR could have clarified it to some extent, but missed the opportunity in *Hassan v. UK*, App. No. 29750/09, Judgment of 16 September 2014.

⁵⁴¹ Higgins, *Themes and Theories*, 477.

⁵⁴² Criddle and Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, 47.

⁵⁴³ ECtHR, *Handyside v. UK*, para. 48.

⁵⁴⁴ HRC, CCPR General Comment No. 29: Article 4 (Derogations during a State of Emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4. The same can be found in Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 65. Tolera interpreted this requirement as if no right, even when subjected to derogation, should be entirely suspended or rendered completely inapplicable in regulating the conduct of a state party invoking derogation, Tolera, “Absence of Derogation Clause”, 235.

also confirmed that derogating “measures must be strictly proportionate to the exigencies of the situation”.⁵⁴⁵

ECtHR acknowledged that states have also wide margin of appreciation in determining whether derogating measures are strictly required, since decisions regarding their adoption, modification, continuation, or termination remain primarily within the state’s authority, as long as the measures comply with Article 15.⁵⁴⁶ However, an overly broad margin of appreciation allows the Court to avoid scrutinizing potential alternative, less authoritarian measures the respondent state could have used.⁵⁴⁷

The *Lawless* case was the first where ECtHR offered a detailed analysis of this requirement, since the applicant argued that even if the circumstances in 1957 warranted derogation, their implementation and enforcement exceeded what was strictly necessary,⁵⁴⁸ hence the Commission not only assessed alternative available methods, but also examined whether the chosen measures included adequate safeguards against misuse.⁵⁴⁹ However, the Court unanimously ruled that Lawless’s detention was justified under a properly exercised right of derogation under Article 15, noting that ordinary laws were insufficient to address the situation and that even special criminal and military courts were ineffective, while the cross-border operations of the IRA hindered intelligence gathering.⁵⁵⁰

Brannigan and McBride v. UK revolved around the fact that the Home Secretary was authorised to designate non-British nationals as “suspected international terrorists”, which enabled their indefinite detention without charge or trial. However, these measures had not been proven to be “strictly required”. ECtHR reminded that although Article 15 emphasises strict necessity, states were granted a broad margin of appreciation and ruled that assessing whether a state had overstepped this margin required considering factors such as the nature of the rights impacted by the derogation, the circumstances that led to the emergency, and its duration.⁵⁵¹

In one of the most significant cases for this matter, *A and Others v. UK*, it was determined that ultimately, the Court has the authority to determine whether the measures were strictly necessary, meaning (1) whether a derogating measure “was a genuine response to the emergency situation,” (2) whether “it was fully justified by the special circumstances of the emergency,” and (3) whether “adequate safeguards were provided against abuse”.⁵⁵²

⁵⁴⁵ Lillich, “The Paris Minimum Standards”, 1072.

⁵⁴⁶ ECtHR, *Brannigan and McBride v. UK*, App. No. 14553/89, 14554/89, Judgment of 25 May 1993, paras. 57, 43; ECtHR, *Ireland v. UK*, paras. 207. and 214.

⁵⁴⁷ Harris, O’Boyle, Bates, Buckley, *Law of the European Convention*, 826.

⁵⁴⁸ ECtHR, *Lawless v. Ireland* (No. 3), para. 32.

⁵⁴⁹ *Ibid*, paras. 34-37.

⁵⁵⁰ *Ibid*, paras. 36-38.

⁵⁵¹ ECtHR, *Brannigan and McBride v. UK*, para. 43. See also, Ben Emmerson QC, Andrew Ashworth QC, Alison Macdonald, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2007), 63.

⁵⁵² ECtHR, *A and Others v. UK*, para. 184. Criddle noticed that out of context, such statements may falsely suggest that the ECtHR alone translates the Convention’s general standards into rules applicable to specific cases, but its margin of appreciation doctrine reflects a jurisprudence of altruism, where human rights bodies oversee state responses to emergencies while allowing states to take the lead in modifying the Convention’s general regime address threats and protect human rights, Criddle, “Protecting Human Rights During Emergencies”, 47-48.

Adequate safeguards for preventing the misuse of derogation measures are crucial, which is why regular evaluation of each derogation measure, along with periodic legislative and judicial review, has been recognised as essential in mitigating potential abuses.⁵⁵³ The ECtHR considered ongoing and continuous review of emergency measures essential, viewing it as “implicit in the very notion of proportionality”.⁵⁵⁴

The HRC was explicit in that the proportionality of derogating measures is a fundamental requirement that should be determined in relation to three aspects – their duration, geographic scope, and severity.⁵⁵⁵

When it comes to the temporal aspect, the strict necessity requirement means that derogation measures can only stay in effect as long as the emergency lasts.⁵⁵⁶ While neither the ECHR nor the ICCPR explicitly mandates that public emergencies be temporary, the ECtHR acknowledged the HRC’s statement given in General Comment No. 29 that derogating measures “must be of an exceptional and temporary nature”.⁵⁵⁷ The Court pointed out that when assessing whether the state’s response is proportionate, the duration of an emergency can be a relevant factor, while, on the other hand, even some prolonged crises, such as the UK’s counterterrorism efforts in Northern Ireland or Turkey’s actions against Kurdish insurgents, may still justify derogation, but only if taken measures are strictly necessary and proportionate.⁵⁵⁸ Therefore, states do not have to set a fixed end date for emergency measures, yet they must lift them once the threat has passed or the measures are no longer essential and proportionate.⁵⁵⁹ The Inter-American Commission on Human Rights echoed this principle in its report on the state of human rights of the Miskito population in Nicaragua, noting that “once the danger that threatens the security of the State has been overcome, the special provisions should also be terminated”.⁵⁶⁰

As already stated, the geographic scope of any derogation measure must also be strictly necessary to address the threat to the nation’s life and proportionate to its nature and extent.⁵⁶¹ In *Sakik and Others v. Turkey*, the applicant was arrested outside the area officially covered by the derogation and the government tried to justify it by arguing that the terrorist threat extended beyond declared specific regions.⁵⁶² However, the Court rejected this, emphasizing that Article 15 requires derogations to be confined “to the extent strictly required by the exigencies of the situation”, which also refers to territorial aspect, warning

⁵⁵³ ECtHR, *Lawless v. Ireland* (No. 3), para 37.

⁵⁵⁴ ECtHR, *Brannigan and Mc Bride v. UK*, para 54.

⁵⁵⁵ HRC, CCPR General Comment No. 29, para. 4.

⁵⁵⁶ ECommHR, *De Becker v. Belgium*, App. No. 214/56, Report of 8 January 1960, para 271.

⁵⁵⁷ ECtHR, *A and Others v UK*, paras. 110, 178. See also HRC, CCPR General Comment No. 29, para. 2.

⁵⁵⁸ ECtHR, *A and Others v UK*, para. 176.

⁵⁵⁹ *Ibid*, para. 178.

⁵⁶⁰ IACommHR, *Report on the Situation of Human Rights*, 117, para. 14. The case involved the displacement of the Miskito Indians from their ancestral lands to inland Nicaragua, initially justified as a welfare measure but later defended as a response to security threats from armed incursions originating in Honduras, *ibid*, 117-118, paras. 160-19.

⁵⁶¹ UN Economic and Social Council, *Siracusa Principles*, para. 51.

⁵⁶² ECtHR, *Sakik and Others v. Turkey*, App. Nos. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94, Judgment of 26 November 1977, paras. 36, 37.

that allowing extensions beyond declared specified zones would undermine the provision's purpose.⁵⁶³

Finally, implemented measures must be indispensable, meaning that ordinary measures are insufficient to meet the public danger,⁵⁶⁴ or in other words, that the (ordinary) limitations permitted under the human rights treaty in regular times would not be adequate to address the state of emergency. Consequently, all options enabled under limitation clauses (where such clauses exist) must be exhausted before opting for derogation mechanism.⁵⁶⁵ Not only there must be a connection between the circumstances of the emergency and the measures implemented to address it,⁵⁶⁶ but the measures chosen must also involve the least possible interference,⁵⁶⁷ they must be logically linked to their intended aim and effective in achieving it.⁵⁶⁸ To put it differently, proving the necessity for emergency measures alone is usually insufficient to show that they are "strictly required", so the Court will further examine the proportionality between the need and the response.⁵⁶⁹ The proportionality is not some precise calculation but involves the ECtHR assessing whether a less severe alternative could have been considered.⁵⁷⁰ According to Nickel, ECHR establishes a high threshold of severity, whereas the analogous clause in ACHR appears clearer and sets a relatively lower standard.⁵⁷¹

In any case, international tribunals have shown reluctance to establish rigid criteria for determining which measures are strictly necessary in a public emergency, acknowledging that this assessment is best made within the specific context of each crisis rather than through *a priori* formulated rules.⁵⁷²

This stringent necessity standard serves as the most important constraint on derogation powers in emergencies where international law offers minimal regulation, relies on state-centric rules, or lacks specific provisions due to the unprecedented nature of the crisis.⁵⁷³

What Else? – Another condition for a lawful derogation is what Tolera referred to as the principle of consistency,⁵⁷⁴ which indicates that the measures "are not inconsistent with its other obligations under international law". In regard to the ECHR, this condition also stems

⁵⁶³ *Ibid*, para. 39.

⁵⁶⁴ ECtHR, *Lawless v. Ireland* (No. 3), para. 36.

⁵⁶⁵ Tolera, "Absence of Derogation Clause", 235.

⁵⁶⁶ ECommHR, *Ireland v. UK*, Report of 25 January 1976, 97.

⁵⁶⁷ ECommHR, *Lawless v. Ireland*, Report of the Commission adopted on 19 December 1959, Opinion of Mr. Waldock A 51.591, 123.

⁵⁶⁸ El-Rashed, "Derogation in Time of Emergency", 13. See also HRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 14.

⁵⁶⁹ Harris, O'Boyle, Bates, Buckley, *Law of the European Convention*, 825. See also ECtHR, *De Becker v. Belgium*, App. No. 214/5, Judgment of 27 March 1962, para. 271.

⁵⁷⁰ Harris, O'Boyle, Bates, Buckley, *Law of the European Convention*, 825. See also ECtHR, *De Becker v. Belgium*, para. 271.

⁵⁷¹ Nickel, "Two Models of Normative Frameworks for Human Rights During Emergencies", 62.

⁵⁷² Criddle, "Protecting Human Rights During Emergencies", 41.

⁵⁷³ Neuman, "Constrained Derogation", 24.

⁵⁷⁴ Tolera, "Absence of Derogation Clause", 235.

from Article 53, which demands that “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.⁵⁷⁵

However, it has seen little jurisprudence within international monitoring bodies.⁵⁷⁶ In the *Lawless* case, neither the Commission nor the Irish Government addressed this issue, yet the ECtHR, acting *proprio motu*, assessed compliance and concluded that the requirement had been met.⁵⁷⁷

The term “under international law” encompasses both customary and international treaty law.⁵⁷⁸ Scholars suggested UN Charter, other universal or regional human rights treaties, international humanitarian Law, ILO conventions, UN Security Council resolutions and refugee law treaties, including customary international law, as a source of “other obligations under international law”,⁵⁷⁹ while the HRC in this context explicitly mentioned as an example the Convention on the Rights of the Child “which has been ratified by almost all States parties to the Covenant and does not include a derogation clause”⁵⁸⁰.

As all derogation clauses in ICCPR, ECHR and ACHR contain this requirement, it effectively means that restrictions set by one treaty are binding on all states’ parties to other treaties, which not only prevents conflicts between treaties but also makes adherence to other obligations a prerequisite for lawful derogation.⁵⁸¹ HRC agreed with this stance when it stated that “although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant, the Committee has the competence to take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant”.⁵⁸² On the other hand, ECtHR took the view that it is not its role to seek to define authoritatively the meaning of Article 4 of the Covenant,⁵⁸³ thereby missing the chance to contribute towards harmonisation and uniform formation of international standards.

⁵⁷⁵ Cees Flinterman, “Derogation from the Rights and Freedoms in Case of a Public Emergency (Article 15)”, in *Theory and Practice of the European Convention on Human Rights*, eds. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Antwerp: Intersentia, 2006), 1067.

⁵⁷⁶ Higgins, *Themes and Theories*, 481.

⁵⁷⁷ ECtHR, *Lawless v. Ireland* (No. 3), para. 40. In the *Greek* case, the applicants made no submissions on this point. Since the Commission found there was no public emergency threatening the nation’s life, it deemed it unnecessary to assess whether the derogations aligned with Greece’s international obligations, for more see Higgins, *Themes and Theories*, 481.

⁵⁷⁸ Tolera, “Absence of Derogation Clause”, 236. See also Neuman, “Constrained Derogation”, 29. There are also views that customary international law would not have large practical impact in this matter, due to wide overlapping of state parties to the ICCPR and regional treaties, such as ECHR, Harris, O’Boyle, Bates, Buckley, *Law of the European Convention*, 827.

⁵⁷⁹ Sommario, “Derogation from Human Rights Treaties”, 338.

⁵⁸⁰ HRC, *CCPR General Comment No. 29*, para. 10.

⁵⁸¹ See also Neuman, “Constrained Derogation”, 29.

⁵⁸² HRC, *CCPR General Comment No. 29*, para. 10.

⁵⁸³ ECtHR, *Brannigan v. UK*, para. 72. It did state though that it must examine whether there is any plausible basis for the applicant’s argument in this respect and found that there was not. *Ibid.*

Fair to All? – Finally, derogation measures must not be discriminatory. Both the ICCPR and the ACHR explicitly forbid states from adopting derogation measures that discriminate based on race, color, sex, language, religion, or social origin.⁵⁸⁴

The non-discrimination principle is absent from Article 15 of the ECHR, yet, it could be contended that for those state parties which are also bound by the ICCPR, the prohibition of discriminatory derogation measures under Article 4 of the ICCPR constitutes one of their “other obligations under international law”, hence it is applicable to them, too.⁵⁸⁵ There is also seemingly valid argument that this absence is insignificant, as any differential treatment lacking objective and reasonable justification or being disproportionate to its intended aim would likely not meet the “strict necessity” requirement.⁵⁸⁶

Peculiarly enough, the wording in Article 4 of the ICCPR includes the qualifier “solely” within the non-discrimination principle, which sparked some discussion.⁵⁸⁷ According to some scholars, the presence of the word serves as clear proof that, if all other conditions are fulfilled, unintentional (inadvertent) discrimination in derogations may still be lawful.⁵⁸⁸ It remains to be seen how this will manifest in practice.

To Whom It May Concern? – At last, there is also a procedural condition for lawful derogation laid down in every analysed derogation clause.

Article 15 of the ECHR in paragraph 3 requires that “any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.

However, paragraph 3 of Article 15 does not outline all the requirements that the notification should meet. For example, the ECHR does not specify a deadline, but the Court ruled that notification must occur “without any avoidable delay” rather than immediately, so in *Lawless* case, it deemed a twelve-day gap between the enforcement of measures and notification to the Secretary-General acceptable.⁵⁸⁹ Therefore, it can be concluded that notification does not need to precede the derogation, as long as it is provided within a reasonable timeframe.⁵⁹⁰ In the *Greek* case, even though the notification of measures may have been provided within a reasonable time, the same did not apply to the reasons for the derogation, which was only communicated later, in an incomplete manner, thus the Commission clarified that information provided in proceedings cannot substitute for or be

⁵⁸⁴ The same is contained in the Arab Charter.

⁵⁸⁵ Harris, O’Boyle, Bates, Buckley, *Law of the European Convention*, 828.

⁵⁸⁶ Juan Oraà, *Human Rights in States of Emergency in International Law* (Oxford: Oxford University Press, 1992), 181.

⁵⁸⁷ “...do not involve discrimination *solely* on the ground of race, colour, sex, language, religion or social origin”.

⁵⁸⁸ Higgins, *Themes and Theories*, 461.

⁵⁸⁹ ECtHR, *Lawless v. Ireland* (No. 3), para 47.

⁵⁹⁰ Oraà, *Human Rights in States of Emergency*, 62.

considered equivalent to the notification required under Article 15, which ensures that all High Contracting Parties and Convention bodies are informed.⁵⁹¹

This brings up another key issue concerning the required elements in the notification. According to the ECtHR, this obligation is fulfilled by submitting a letter along with copies of the legal texts outlining the emergency measures and an explanation of their purpose.⁵⁹²

Similarly, in the paragraph's wording there is no reference to periodic reports or notifications, but the ECtHR has stated that a continuous review of the necessity of emergency measures is required.⁵⁹³ Still, even without this explicit guidance from the Court, the obligation to "fully inform" can reasonably be understood as requiring regular updates to the initial notification as the situation evolves.⁵⁹⁴ This approach shows that states are acting in good faith and that they are genuinely trying to meet the proportionality requirement.⁵⁹⁵ In this context, it is important to remind that most states that issued a notification regarding the COVID-19 crisis followed up with updates on how the situation was evolving and whether the state of emergency would need to be extended.⁵⁹⁶ Thus, it can be concluded that Convention parties recognise not only the formal procedure outlined in Article 15 but also its underlying purpose. Hence, the distinction between states that adhered to this requirement and those that bypassed it must be considered when evaluating their implementation of derogation mechanism.⁵⁹⁷

Taking everything said into account, it does not come as a surprise that there is a notable difference among the various derogation-related notifications, evident in the fact that some explicitly list the specific ECHR articles subject to derogation, despite no formal requirement to do so, while others do not. This is probably due to the fact that in times of great uncertainty, states may not be able to immediately determine which measures will be necessary to address an evolving and unpredictable crisis.⁵⁹⁸ Still, this fact could be overcome through continuous review of implemented measures. Put simply, there is little to criticise in a scenario where a state informs the Secretary-General of its strategy to address a threat, including the specific measures to be implemented and the rights they may derogate, and later provides additional notifications if new measures become necessary, or the earlier adopted measures has an effect on broader list of rights than initially apprehended, or when derogation measures are no longer required.⁵⁹⁹ This is in line with the purpose of paragraph 3, which is to enhance transparency by ensuring that other

⁵⁹¹ ECommHR, *Report on the "Greek Case"*, 41, para. 79 (5), (6) and 42, para. 80. Higgins interpreted this decision as if the Commission implicitly rejected the idea that failure to comply with notification requirement would not nullify derogations, Higgins, *Themes and Theories*, 467.

⁵⁹² ECtHR, *Lawless v. Ireland (No. 3)*, para 47.

⁵⁹³ ECtHR, *Brannigan and McBride v. UK*, para 54.

⁵⁹⁴ Ana Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for Covid-19 Crisis?", *Iustinianus Primus Law Review* 11 (2020): 10.

⁵⁹⁵ Harris, O'Boyle, Bates, Buckley, *Law of the European Convention*, 829.

⁵⁹⁶ Zdravković, "The Affair of "State of Emergency", 10.

⁵⁹⁷ *Ibid*, 10.

⁵⁹⁸ *Ibid*. See also Harris, O'Boyle, Bates, Buckley, *Law of the European Convention*, 829-830. Interestingly enough, Sommaro noted that in the Greek case, the Commission concluded that a government does not need to point out the provisions from which it is derogating, provided they can be deduced from reviewing the documents attached to the notice, Sommaro, "Derogation from Human Rights Treaties", 341. See also, ECommHR, *Report on the "Greek Case"*, 30.

⁵⁹⁹ Zdravković, "The Affair of "State of Emergency", 10.

contracting states, through the Secretary-General, are informed of measures that would normally constitute a violation of ECHR.⁶⁰⁰ From this standpoint, it seems unclear and somewhat contradictory for a state to report specific emergency measures without identifying the ECHR articles they may impact, hence, specifying the relevant ECHR articles subject to derogation should be an essential part of every notification.⁶⁰¹

Since derogation can last only for a limited amount of time, until cause of the state of emergency is solved, the obligation for international notification expectedly also extends to the termination of a derogation, requiring a second notice to inform other state parties of the date on which the derogation measures were revoked.⁶⁰² A state party invoking derogation must promptly implement measures to ensure the full restoration of rights and freedoms once the circumstances justifying the derogation subside.⁶⁰³ That said, not so strict approach has been applied to failures in notifying the end of derogation measures. For instance, the UK issued three separate Article 15 derogation notices for Northern Ireland, each introducing new measures rather than mere extensions, where some later measures replaced earlier ones, yet the first two notices were never formally withdrawn and neither Ireland nor the Commission challenged the UK's right to invoke further derogations.⁶⁰⁴

As demonstrated, many aspects of this paragraph remain ambiguous and unclear. This is likely due to the limited number of ECtHR rulings on the issue and the reluctance of ECHR bodies to establish definitive positions, such as, when the Commission has stated that it is "still not called upon generally to determine the question of whether failure to comply with Article 15(3) nullifies a derogation".⁶⁰⁵ Although ECtHR left this question open, it can be claimed that even if failure to adhere to the established standards in this regard might not directly preclude invoking derogation clause, it does indicate bad faith, which is a relevant factor in assessing other conditions under Article 15.

When it comes to the ICCPR, it should firstly be noted that Article 4 in its first paragraph requires a formal proclamation of the existence of the public emergency.⁶⁰⁶ Such a proclamation should comply with constitutional and other applicable domestic legal provision.⁶⁰⁷ This act is typically a decision made by a state's political authorities and is generally subject to various substantive and procedural requirements.⁶⁰⁸ From a human rights law perspective, publishing this act is crucial for informing the community about potential extraordinary restrictions on rights and institutional changes caused by the emergency, with its inclusion in the ICCPR probably aimed at minimizing *de facto*

⁶⁰⁰ ECommHR, *Greece v. UK*, App. No. 176/56, Decision of 2 June 1956, para. 158.

⁶⁰¹ Zdravković, "The Affair of "State of Emergency", 10.

⁶⁰² Tolera, "Absence of Derogation Clause", 234.

⁶⁰³ *Ibid.*

⁶⁰⁴ Higgins, *Themes and Theories*, 471.

⁶⁰⁵ ECommHR, *Cyprus v. Turkey*, App Nos. 6780/74, 6950/75, Report of 10 July 1976, as cited in Natasha Holcroft-Emmess, "Derogation to Deal with Covid 19: State Practice and Thought on the Need for Notification", *EJIL Talk - Blog of the European Journal of International Law* (10 April 2020), <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/> (accessed 15.06.2025). See also Zdravković, "The Affair of "State of Emergency", 11.

⁶⁰⁶ Article 4, paragraph 1.

⁶⁰⁷ HRC, *CCPR General Comment No. 29*, para. 2. Arab Charter requires the same.

⁶⁰⁸ Sommaro, "Derogation from Human Rights Treaties", 333.

emergencies.⁶⁰⁹ The HRC underlined that this requirement “is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.⁶¹⁰

Unlike the ICCPR, neither the ECHR nor the ACHR explicitly require official proclamation of public emergency. Still, in *Cyprus v. Turkey*, the Commission held that Article 15 necessitates some formal and public act of derogation, such as declaring martial law or a state of emergency, without which Article 15 cannot apply.⁶¹¹ Most importantly, as already explained, treaties mandate that states respect their other international obligations, meaning that those bound by the ICCPR still have a duty to officially proclaim derogations under Article 4 ICCPR. This argument was raised in *Brannigan and McBride v. UK*, where the ECtHR refused to define the meaning of “officially proclaimed” from the ICCPR but accepted a statement by the Secretary of State, where the reasons for derogation were outlined, as meeting this requirement.⁶¹²

According to para. 3 of Article 4 of the ICCPR “any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”.⁶¹³

Last paragraph of Article 27 of the ACHR is almost identical, stating that “any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organisation of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”.

Most detailed instruction can be found in Siracusa Principles, which specified that: “the notification shall contain sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:

- (a) the provisions of the Covenant from which it has derogated;
- (b) a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation;
- (c) the effective date of the imposition of the state of emergency and the period for which it has been proclaimed;
- (d) an explanation of the reasons which actuated the government’s decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and

⁶⁰⁹ *Ibid*, 334.

⁶¹⁰ HRC, CCPR General Comment No. 29, para. 2.

⁶¹¹ ECommHR, *Cyprus v. Turkey*, as cited in Holcroft-Emmess.

⁶¹² ECtHR, *McBride v. UK*, App. No. 27786/95, Decision of 25 May 1993, paras. 67–73.

⁶¹³ Article 4, para. 3. ICCPR.

(e) a brief description of the anticipated effect of the derogation measures on the rights recognised by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.”⁶¹⁴

Obviously, the first difference that catches one’s attention is the explicit requirement to “immediately inform”, that cannot be found in the ECHR.

What is more, unlike ECHR, where a state invoking derogation must fully inform the CoE Secretary-General of its measures and reasons for derogation, who then circulates the notice to other member states, the ICCPR’s and ACHR’s derogation clauses are phrased slightly differently, specifying other state parties as the recipients of the information, with the Secretary-Generals serving as the intermediaries for its transmission.⁶¹⁵ The aim of this setting is to ensure that all state parties and monitoring bodies oversee the nature and scope of derogation measures, potential abuse of emergency powers and possible human rights violations.⁶¹⁶

Next striking difference is in that the ICCPR and ACHR require states to specify the treaty provisions they plan to derogate from, whereas the ECHR only mandates a description of the derogating measures,⁶¹⁷ but as already states, some member state of the ECHR also did that, confirming that this requirement should be understood as implicit part of the Article 15, stemming from the aim of that provision. In any case, some scholars found that countries that are most inclined to disclose details about how long a derogation will last and which rights will be limited tend to be stable democracies with strong judicial control of the executive,⁶¹⁸ which are not expected to avoid their obligations under this mechanism.

On the other hand, what is common to all those treaties is that they provide no clear guidance on what consequences are attached to a failure to comply with the notification requirements, and practice across different instruments remains inconclusive. However, in the *Lawless* case, the Commission stated that under certain conditions, failure to comply with notification requirements could lead to the nullification of derogation or other consequences.⁶¹⁹ Sommario recalled that the HRC, when reviewing Sri Lanka’s first periodic report, emphasised that “as long as no notification or justification had been given in respect of rights permitting derogation, they must be considered in force and hence the Government must account for them as in normal situations”,⁶²⁰ while Siracusa Principles emphasised that “state party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other states parties and may be deprived of the defenses otherwise available to it in procedures”⁶²¹. In any case, it remains true that monitoring bodies cannot factually recognise a state’s derogation if no notification has been made.

⁶¹⁴ UN Economic and Social Council, *Siracusa Principles*, para. 45.

⁶¹⁵ Sommario, “Derogation from Human Rights Treaties”, 340. Arab Charter impose a similar obligation regarding the Secretary-General of the League of Arab States.

⁶¹⁶ HRC, *CCPR General Comment No. 29*, para 17.

⁶¹⁷ The same requirement can be found in the Arab Charter.

⁶¹⁸ Hafner-Burton, Helfer, Farris, “Emergency and Escape”, 2016, 85.

⁶¹⁹ ECommHR, *Lawless v. Ireland*, paras. 80-82.

⁶²⁰ UN General Assembly, *Report of the Human Rights Committee*, UN Doc. A/39/40 (1984), 21, para 104; Sommario, “Derogation from Human Rights Treaties”, 341.

⁶²¹ UN Economic and Social Council, *Siracusa Principles*, para. 47.

After all, even though the HRC did not specify whether failing to notify the UN Secretary-General invalidates a derogation, it is arguable that any derogation violating Article 4, including procedural breaches, cannot be deemed lawful.

With all this vagueness surrounding notification requirement, it is no wonder that the case-law regarding this matter is inconsistent. On many occasions, HRC has deemed it necessary to issue concluding observations for multiple states, reiterating their duty to provide notification,⁶²² while Neuman described examples where states which are part of the ICCPR and some other regional convention submitted notifications under one treaty and not the other.⁶²³ Comparison of the practice in Africa with that of states in Latin America also reveals the failure by African states to honour their duty to notify under the ICCPR when they declare state of emergency.⁶²⁴

Ultimately, this procedural requirement within derogation clause is significant because it additionally protects the derogation mechanism from abuse,⁶²⁵ and guarantees that international law's restrictions on declaring states of emergency are upheld.⁶²⁶ Despite the fact that some commentators perceive the differences among treaties as inconsiderable,⁶²⁷ they seem to be more significant than firstly meets the eye, showing how little words can make a big difference and leading to a confusion and oversight in practice – an issue that requires urgent correction, both in terms of clarification by monitoring bodies and more consistent application by states.

2.2.3. *Non-derogable Rights*

One of the cornerstones of the derogation regime under human rights treaties is the principle of non-derogability, according to which certain rights can never be suspended, even during the public emergency threatening the life of the nation.⁶²⁸

Non-derogable rights arguably constitute an intriguing category that has attracted some attention in legal scholarship, with authors exploring plausible theoretical explanations for their existence, as well as their consequences.

To begin with, this property of a right could serve as a criterion for identifying *jus cogens* norms, since only those rules that cannot be derogated from are capable of attaining the status of peremptory norms in general international law.⁶²⁹ The International Law Commission confirmed this by viewing non-derogability as the formal manifestation of the

⁶²² See, e.g., HRC, *Concluding Observations on Guatemala*, U.N. Doc. CCPR/C/CO/72/GUA (2001), para. 11; HRC, *Concluding Observations on Madagascar*, UN Doc. CCPR/C/MDG/CO/3 (2007), para. 13; HRC, *Concluding Observations on the Syrian Arab Republic*, UN Doc. CCPR/CO/84/SYR (2005), para. 6; *Concluding Observations on Thailand*, UN Doc. CCPR/CO/84/THA (2005), para. 13; HRC, *Concluding Observations on Zambia*, UN Doc. CCPR/C/ZMB/CO/3 (2007), para. 15; cf. HRC, *CCPR General Comment No. 29*, para. 17.

⁶²³ For instance, in 1997, Albania notified the Council of Europe but not the United Nations and in 2005, France notified the United Nations but not the Council of Europe, Neuman, “Constrained Derogation”, 25. There are also similar examples during the pandemic.

⁶²⁴ Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2012), 334.

⁶²⁵ Tolera, “Absence of Derogation Clause”, 234.

⁶²⁶ Criddle and Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, 48.

⁶²⁷ Tolera, “Absence of Derogation Clause”, 234.

⁶²⁸ Sommario, “Derogation from Human Rights Treaties”, 342.

⁶²⁹ As defined in Article 53 of the VCLT.

special status that these norms hold: “the idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability”.⁶³⁰ For that reason, certain authors understood non-derogability as a direct result of the fundamental interest safeguarded by the right that cannot be derogated from.⁶³¹ El-Rashed followed this line of reasoning when she derived the absolute status of rights from the fact that even in the most serious emergencies they cannot be derogated “on the grounds that they are inherently too fundamental to ever be infringed upon” and, subsequently, there is “no justifiable state objective to be sought in their curtailment”.⁶³²

Hartman also questioned whether the designation of certain rights as non-derogable in treaties serves to reflect or reinforce established principles of international law, whether variations across treaties obstruct the development of customary law, and whether there is a theoretical basis justifying the specific selection of these rights.⁶³³ She argued that the presence of common non-derogable rights in all derogation clauses signifies that derogation cannot be used to justify actions constituting international crimes, such as genocide or slavery, and that these rights are fundamental to human dignity.⁶³⁴ While recognizing the temptation to assume that listing a right as non-derogable confirms its fundamental nature, she admitted that inconsistencies in the list of non-derogable rights across different human rights treaties weaken this assumption, finding it additionally problematic that the definitions of the four commonly recognised non-derogable rights vary across those treaties.⁶³⁵

An unusual theoretical account of non-derogability is offered by Evan J. Criddle and Evan Fox-Decent, who sought to develop a comprehensive theory of human rights to elucidate the normative foundation of international human rights law and to justify the distinction between derogable and non-derogable rights while ensuring that state emergency powers remain subject to external review.⁶³⁶ Challenging traditional perspectives that view human rights as abstract, timeless and inalienable – belonging to all individuals solely by virtue of their shared humanity and therefore struggling to explain why some of rights are derogable in emergencies⁶³⁷ – they turned to the fiduciary conception of state authority under the international human rights law.⁶³⁸ From this

⁶³⁰ UN General Assembly, *Report of the International Law Commission on Its Seventy-First Session (29 April–7 June and 8 July–9 August 2019)*, UN Doc. A/74/10 (2019), 155.

⁶³¹ Steve Foster, *Human Rights and Civil Liberties* (Harlow: Pearson Education, 2011); Ricardo Pisillo Mazzeschi, Alessandra Viviani, “General Principles of International Law: From Rules to Values?”, in *Global Justice, Human Rights and the Modernization of International Law*, eds. Riccardo Pisillo Mazzeschi, Pasquale De Sena (Cham: Springer, 2018), 143.

⁶³² El-Rashed, “Derogation in Time of Emergency”, 14-15.

⁶³³ Hartman, “Derogation from Human Rights Treaties”, 15.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*, 15.

⁶³⁶ Criddle and Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, 51. Additionally, they found such a theory essential for countering the Schmittian argument that sovereign discretion overrides legal constraints during national crises.

⁶³⁷ Criddle and Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, 58, referring to Jack Donnelly, *International Human Rights* (Westview Press, 1998), 18–20, and Alan Gewirth, *Human Rights: Essays On Justification And Applications* (University of Chicago Press, 1982), 1-2.

⁶³⁸ Criddle and Fox-Decent, “Human Rights, Emergencies, and the Rule of Law”, 58-59.

perspective, they argued that the non-derogable character of the prohibition against torture aligns with the spirit of fiduciary relationship, as a state that breaches this norm cannot credibly assert that it treats its people as equal beneficiaries under the rule of law.⁶³⁹ If states function as fiduciaries of the people, they have a duty to ensure security, equality and freedom of all individuals under their jurisdiction.⁶⁴⁰ Yet, this fiduciary relationship both constrains and legitimises state authority, as even in times of emergency, state cannot violate certain human rights without undermining its own legitimacy.⁶⁴¹ They drew on the Kant's idea that every individual possesses an innate right to as much freedom as can be compatible with the freedom of others.⁶⁴² From this standpoint, the role of law is to uphold human dignity by establishing legal rights within a framework of equal and secure liberty for all, ensuring that no one can unilaterally dictate the terms of interaction with others, thus making room for the conception of derogable rights (and it could be added, human rights restrictions in general).⁶⁴³ On the other hand, violating certain fundamental rights, in this case, those non-derogable ones, would mean treating individuals as mere instruments of state power rather than as equal co-beneficiaries of legal protection, which can never be compatible with a regime of secure and equal freedom.⁶⁴⁴

There is also a convincing force in the argumentation that the differentiation between derogable and non-derogable rights most clearly illustrates the hierarchy within human rights. For Rhona Smith, "the creation of a body of non-derogable rights within human rights law has sometimes been taken to add weight to the notion of a hierarchy of rights with the non-derogable rights being somehow higher than the others".⁶⁴⁵ Due to their distinct normative status, non-derogable rights are often considered as core human rights, *jus cogens* norms and obligations *erga omnes*.⁶⁴⁶ However, this stance is not without its problems – if all non-derogable rights were inherently *jus cogens*, then non-derogable prohibition on imprisonment for debt would also qualify as such.⁶⁴⁷ Yet, nobody would accept this logical conclusion,⁶⁴⁸ as its non-derogability is the sole evidence of its peremptory normative nature, with no other proofs substantiating this conclusion. Moreover, as stated before, three different human rights treaties enumerate varying lists of non-derogable rights, suggesting that they should not all be treated in the same way.⁶⁴⁹ This is why Teraya Koji opposed using the term non-derogable as a singular concept and identified at least three approaches to identifying such rights.⁶⁵⁰

⁶³⁹ *Ibid*, 39, 55–56.

⁶⁴⁰ *Ibid*, 40 – 41.

⁶⁴¹ *Ibid*, 41.

⁶⁴² *Ibid*, 52.

⁶⁴³ *Ibid*, 52.

⁶⁴⁴ *Ibid*, 55.

⁶⁴⁵ Rhona K. M. Smith, "The Right to Life", in *Textbook on International Human Rights*, ed. Rhona K. M. Smith (Oxford University Press, 2014), 166-167.

⁶⁴⁶ Teraya Koji, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights", *European Journal of International Law* 12, no. 5 (December 1, 2001): 920.

⁶⁴⁷ *Ibid*, 920.

⁶⁴⁸ *Ibid*.

⁶⁴⁹ *Ibid*.

⁶⁵⁰ *Ibid*, 921.

To begin with, he labelled the first approach “value-oriented” identification, which views non-derogable rights as an intrinsically valuable part of human rights.⁶⁵¹ The underlying reason is the fact that international law - primarily an inter-state legal system - protects these rights even when the survival of the state is at risk.⁶⁵² This very feature underscores the hierarchical structure of human rights norms.⁶⁵³

One of the arguments in favour of this position recalls that during the drafting of various human rights treaties, some states, like the UK and Belgian representatives for the ECHR, described non-derogable rights as “fundamental” and “*essentiels au respect de nous-mêmes*”.⁶⁵⁴ In addition, scholars have also emphasised their exceptional status, referring to them as “the most basic human rights”, “core rights”, “irreducible core”, “sacrosanct rights”, “*les droits fondamentaux réservés*”.⁶⁵⁵

The justification is straightforward – the most important rights warrant the highest level of protection.⁶⁵⁶ However, prioritizing certain rights over others invites criticism for being subjective and arbitrary.⁶⁵⁷ As Meron acknowledged, “the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance”.⁶⁵⁸

Koji’s second method of identification, the “function-oriented” approach, emphasises that while non-derogable rights are often seen as the core of human rights, some norms, such as those protecting medical and religious personnel, also play a crucial role during states of emergency.⁶⁵⁹ He branched it out further based on two criteria – direct and indirect. The first one considers the practical necessity of protecting certain rights, especially in states of emergency,⁶⁶⁰ while the other implies that non-derogable rights often emerge as the residuum that remain after a state declares its need to derogate from certain human rights obligations to resolve the crisis.⁶⁶¹

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ Council of Europe, *Collected Edition of the “Travaux Préparatoires”*, vol. VI (1985), 78–81, 126–129. On the right to marriage in the *travaux préparatoires* of the ICCPR, see, UN General Assembly, *Third Committee, Summary Record of the 1261st Meeting*, UN Doc. A/C.3/SR.1261 (1978), para. 31; UN General Assembly, *Third Committee, Summary Record of the 1262nd Meeting*, UN Doc. A/C.3/SR.1262 (1963), para. 16.

⁶⁵⁵ Koji cites Thomas Buergenthal, ‘The American and European Conventions on Human Rights: Similarities and Differences’, *American University Law Review* 30 (1981): 165; Arthur Henry Robertson, “Humanitarian Law and Human Rights”, in *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix – Rouge en l’honneur de Jean Pictet*, ed. Christophe Swinarski (ICRC, 1984), 798; Aristidis S. Calogeropoulos—Stratis, *Droit humanitaire et droits de l’homme* (Institut universitaire de hautes études internationales and A.W. Sijthoff/Kluwer Academic Publishers, 1980), 130.

⁶⁵⁶ Koji, “Emerging Hierarchy”, 921.

⁶⁵⁷ *Ibid.*, 922.

⁶⁵⁸ Theodor Meron, “On a Hierarchy of International Human Rights”, *American Journal of International Law* 80, no. 1 (1986): 1, 8; Koji, “Emerging Hierarchy”, 922.

⁶⁵⁹ Koji, “Emerging Hierarchy”, 923.

⁶⁶⁰ *Ibid.*, 922.

⁶⁶¹ *Ibid.*, 923.

Although this indirect criterion is commonly referenced, it still poses difficulties.⁶⁶² The list of non-derogable rights includes rights like the prohibition of imprisonment for debt, where derogation is not relevant, while some non-derogable rights appear somewhat miscellaneous.⁶⁶³

In any case, both described approaches are in fact value-oriented and can be boiled down to the fact that certain rights need to be protected even during crises and this function is verified by their significance.⁶⁶⁴

The final approach he called “consent-oriented” identification, conceiving non-derogable rights as determined by state consent through treaties and resulting from political compromises, as they accept non-derogability based on prior agreements rather than intrinsic values or functional necessity.⁶⁶⁵ However, non-derogable rights are designed to command the highest level of respect, making their substantive nature more important than their procedural aspect, enshrined in this last approach.⁶⁶⁶

In his effort to address the issue of hierarchy within human rights norms, which is inextricably linked to the category of non-derogable rights, Koji recalled that in General Comment No. 3, the CESCR reinforced the interdependence and indivisibility of human rights while simultaneously highlighting the importance of minimum core obligations, such as ensuring access to essential foodstuffs, underlining that this differentiation suggests the existence of a hierarchy to some extent.⁶⁶⁷ He reminded that the conventional view of human rights as interdependent and indivisible was established to counter the division of rights that had resulted in civil and political rights taking precedence over economic and social rights,⁶⁶⁸ which should not be endorsed, given that a significant portion of the global population lacks fundamental necessities, including food.⁶⁶⁹

Conversely, for Koji, the core theory should be perceived as central one, even though it is not without its own drawbacks.⁶⁷⁰ For instance, if the existence of core rights or a central

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*, 924.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.*, 925. CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, paras. 8–10. The preamble to the Universal Declaration of Human Rights adopted on 10 December 1948 emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, UN General Assembly, *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/RES/217(III) (10 December 1948). It is now widely accepted that human rights are *inherent* (not granted by any person or authority), *fundamental* (without them the life and dignity of every human being would be meaningless), *inalienable* (cannot be rightfully taken away nor denied), *indivisible* (cannot be divided), *universal* (they apply irrespective of one's origin, status, color, sex or any other personal trait) and *interdependent* (the fulfilment or exercise of one human right depends on the realisation of the other). For some of these traits see UN Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, para. 5.

⁶⁶⁸ Koji, “Emerging Hierarchy”, 925.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

set of rights is acknowledged, the challenge of defining that core without resorting to arbitrary judgment inevitably arises.⁶⁷¹

One way to determine core rights is relying on state consent through the lowest common denominator, an approach also used to identify shared (non-derogable) rights across multiple treaties.⁶⁷² While this method helps maintain stability within international relations, it fails to establish clear criteria for defining reasonable core, as it merely reflects state consensus rather than the desirable character of the rights themselves.⁶⁷³

Another approach, reflected to some extent in the cited General Comment No. 3, stresses the immediate nature of obligations, meaning that some rights, including certain economic and social rights, can be realised immediately.⁶⁷⁴ Though practical, Koji found this method to be incomplete because it operates only after specific norms have already been established as rights.⁶⁷⁵ He insisted that immediacy does not necessarily indicate a recognizable core norm, nor does it cover vital norms that cannot be realised immediately.⁶⁷⁶

Final possible method to defining the core involves examining the (inter)dependence of each right - especially the Basic Human Needs Approach - which asserts that identifying basic needs should stem from the view that no human right can be fully realised without first satisfying these basic needs of people, such as food and nutrition.⁶⁷⁷ Yet again, despite the fact that scientific insights might be able to aid in outlining these basic needs, the challenge of precisely defining them persists.⁶⁷⁸

Koji further noted that this lead to the so-called value-neutral approach, which focuses on the logical interdependence of each right.⁶⁷⁹ It argues that violating basic rights automatically undermines all other rights.⁶⁸⁰ Shue also acknowledged early on the challenges of assessing this value, emphasizing that labelling a right as basic does not imply that it is more valuable or inherently more satisfying to enjoy than other rights.⁶⁸¹ Be that as it may, for Koji it was more important to prevent arbitrary decisions masked as neutrality rather than simply avoiding value judgments.⁶⁸²

Ultimately, non-derogable rights largely represent negative rights, ensuring freedom from state interference, but Koji maintained that this is merely a matter of formulation and should not lead to the mistaken belief that economic and social rights have no core, *i.e.*, no

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.* See also Stephen P. Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts", in *The International Dimensions of Human Rights*, vol. I, ed. Karel Vasak (Paris: UNESCO; Westport, CT: Greenwood Press, 1982), 203.

⁶⁷³ Koji, "Emerging Hierarchy", 926.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *Ibid.*

⁶⁸¹ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980), 20.

⁶⁸² Koji, "Emerging Hierarchy", 926 – 927.

important parts.⁶⁸³ Likewise, he highlighted that when identified through function-oriented approach, non-derogable rights should not be assumed to be core rights or the core of rights and *vice versa*.⁶⁸⁴ This was crucial for Koji to illustrate that the absence of non-derogable rights in certain international treaties, such as the ICESCR and the European Social Charter, does not imply that these treaties lack core or important rights.⁶⁸⁵ Still, the negative formulations embedded in these provisions – often resembling deontological categories – may signify more than just a matter of normative technique and drafting style.

In analysing the relationship between non-derogable rights and *jus cogens* norms, Koji asserted that lawmakers cannot arbitrarily designate a norm as non-derogable and that granting such status reflects norm's greater significance, as is the case with *jus cogens*.⁶⁸⁶ At any rate, it is obvious that the list of non-derogable rights varies depending on the identification approach used, and not all necessarily assume *jus cogens* status.⁶⁸⁷ Consequently, Koji concluded that *jus cogens* and non-derogable rights overlap only when the latter are identified through the value-oriented approach.⁶⁸⁸

Lastly, the value-oriented approach, which Koji leaned toward the most, is the most legitimate method for establishing a hierarchy of rights. Despite admitting that numerous scholars and institutions opposed the idea of a hierarchy in human rights, due to the principle of indivisibility,⁶⁸⁹ he went on to define the key feature of hierarchy being its value-oriented foundation, viewed from the perspective of the international community.⁶⁹⁰ Hierarchical norms are those that embody collective interests and hold universal validity, a characteristic that non-derogable rights have the capacity to fulfil.⁶⁹¹ This is probably why Koji concluded that non-derogable rights extend beyond inter-state relations in the international society and play a crucial role in shaping the constitutional framework that human rights establish on a global scale.⁶⁹²

In any case, as Hartman underlined, there is no denying that fundamental rights are most crucial in times of social or political unrest, when the likelihood of abuse is at its peak.⁶⁹³ In these situations, minorities and other particularly vulnerable groups face heightened danger, since a hostile government might exploit the crisis as a pretext for enforcing repressive measures.⁶⁹⁴ Therefore, she maintained that derogation clauses can be viewed as an effort to restrict states from suspending certain fundamental rights, as they specifically safeguard non-derogable rights from emergency measures and reinforce a more

⁶⁸³ *Ibid.*, 927.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid.*, 929.

⁶⁸⁷ *Ibid.*, 931.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.*, 918.

⁶⁹⁰ *Ibid.*, 936.

⁶⁹¹ *Ibid.*, 936 – 937.

⁶⁹² *Ibid.*, 940 – 941.

⁶⁹³ Hartman, "Derogation from Human Rights Treaties", 11.

⁶⁹⁴ *Ibid.*

robust role of the judiciary in upholding their protection.⁶⁹⁵ For Hafner-Burton, Helfer and Fariss “the inability of states lawfully to suspend these non-derogable rights during a crisis reveals that the legal breathing space that derogations provide is not infinitely large”⁶⁹⁶. Citing Jamie Oráá, they emphasised that the treaty drafters clearly shared a consensus that certain “fundamental” liberties, including the right to life and the prohibition of torture, were non-derogable because they were “indispensable for the protection of the human being”.⁶⁹⁷

But to determine whether the value of a right was the sole reason for its inclusion among non-derogable rights in human rights treaties, it may be useful to revisit the preparatory work leading up to their adoption.

Travaux préparatoires reports regarding the ECHR indicated that the majority of delegates, despite their numerous disagreements, found common ground in recognizing the need for the derogation clauses to protect certain fundamental rights, even during emergencies,⁶⁹⁸ which can be perceived as at least an indication of the idea of common values that need to be protected at all costs.

During the drafting of the ICCPR, the UK advocated for a specific derogation clause but faced criticism for its proposal failing to ensure certain rights remained inviolable, even in exceptional circumstances,⁶⁹⁹ which further reinforces that the idea of the concept of certain inviolable rights was widespread.⁷⁰⁰ Various reports documenting discussions on the preparation and adoption of treaties further supports this point, such as the one stating that “the consensus of opinion was that certain provisions could not be derogated from even in times of public emergency, but there was much discussion on what those provisions should be”.⁷⁰¹

Delegates from nations across all continents voiced remarkably similar views on the necessity of establishing non-derogable rights.⁷⁰² Their arguments ranged from citing the derogation mechanism under the Hague Convention,⁷⁰³ emphasizing the need for explicitly protecting “certain basic rights and freedoms” during war or public emergencies, since protection of certain rights is even more necessary in time of war than in time of peace,⁷⁰⁴ to

⁶⁹⁵ *Ibid.*

⁶⁹⁶ Hafner-Burton, Helfer, Farris, “Emergency and Escape”, 87.

⁶⁹⁷ Oráá, *Human Rights in States of Emergency*, 94.

⁶⁹⁸ Council Of Europe, *Collected Edition*, vol. IV, 30, as cited in Hartman, “Derogation from Human Rights Treaties”, 5.

⁶⁹⁹ UN Economic and Social Council, Commission on Human Rights, Drafting Committee, *Second Session, Thirty-Fourth Meeting*, U.N. Doc. E/CN.4/AC.1/SR.34 (20 May 1948), 4-6.

⁷⁰⁰ Eventually, UK altered its proposal by adding a list of non-derogable rights, namely the right to life, protection against torture or inhuman treatment, ban on involuntary medical experimentation, prohibition on slavery, and ban on retroactive criminal penalties, UN Economic and Social Council, Commission on Human Rights, *Report on the Fifth Session of the Commission*, UN Doc. E/CN.4/188 (1949), 1.

⁷⁰¹ ECommHR, *Preparatory Work on Article 15*, 16.

⁷⁰² UN Economic and Social Council, *Thirty-Fourth Meeting*, 4-6. It is worth noting that when non-derogable clause was debated, delegates from Egypt and India aligned with the proposals of the UK, see UN Commission on Human Rights, *Fifth Session, Summary Record of the One Hundred and Twenty-Sixth Meeting*, UN. Doc. E/CN.4/SR.126 (17 June 1949), 7-8.

⁷⁰³ Delegate Heyward from Australia, *ibid*, 4.

⁷⁰⁴ Delegate Malik from Lebanon, *ibid*, 4.

those claiming that certain individual human rights and freedoms are above and beyond all emergencies.⁷⁰⁵ It was emphasised that everything should be done “to agree on a list of articles from which there could be no derogation; otherwise, nothing in the covenant would prevent some states from derogating arbitrarily from their obligations”.⁷⁰⁶

To further illustrate the overall logic and how the language of basic rights was used during the preparatory works on non-derogable clauses, several examples can be considered. While brainstorming the specific articles that should be protected, it was for instance noted that “the articles now given in the list related basically to rights affecting the life or liberty of the individual, whereas the right stated in article 22 was not so basic”.⁷⁰⁷ Another argument was that “article 22 was to guarantee protection of the family and the right to marry; those matters were not affected by an emergency situation and, being part of the private and not the public life of the individual, could not represent a danger for the State”.⁷⁰⁸ Lastly, it was deemed unnecessary to include article 22 in the list of non-derogable articles because “it seemed obvious that article 4 related only to those freedoms the exercise of which might endanger the existence of the nation and State security, hence there was no need to mention articles which had nothing to do with the preservation of the State”.⁷⁰⁹ Example was offered as well, by pointing out that “the fact that article 25, dealing with the right of foreign minorities to use their own language, was not mentioned in article 4, paragraph 2, certainly did not mean that, in an emergency, States would have the right to prevent such minorities living in their territory from speaking their own language”.⁷¹⁰

Hence, as Hartman also marked, general opinion of all drafters of human rights treaties was that certain human rights are so fundamental that they must be protected under all circumstances.⁷¹¹ This conclusion is also evident from the Paris Minimum Standards of Human Rights Norms in a State of Emergency, the goal of which was to help ensure that, even in situations where a *bona fide* declaration of a state of emergency has been made, the state concerned will refrain from suspending those *basic* human rights which are regarded as non-derogable under derogable clauses of the ECHR, ICCPR and ACHR.⁷¹² Namely, the document explicitly stated that “the basic rights and freedoms guaranteed by international law shall remain non-derogable even during emergencies”.⁷¹³

However, when it came to defining a specific list of these rights, dissenting opinions inevitably arose – primarily over whether the protections should be limited to the most

⁷⁰⁵ Delegate Santa Cruz from Chile, *ibid*, 5. Notably, delegate WJ from China implicitly agreed with this idea, by reserving the right to revisit the issue of which rights should remain non-derogable, *ibid*, 5.

⁷⁰⁶ Representative from Uruguay, UN Commission on Human Rights, *Sixth Session, Summary Record of the Hundred and Ninety-Fifth Meeting*, UN Doc. E/CN.4/SR.195 (29 May 1950), para. 71.

⁷⁰⁷ Delegate Moreno Salcedo from Philippines, see UN General Assembly, *1261st Meeting*, para. 5. As this delegate was advocating for the inclusion of Article 22, the main argument was that the right at hand “had the same value as other articles”, since “it was an integral part of the draft Covenant”, *ibid*, para. 29.

⁷⁰⁸ Delegate Capotorti from Italy, *ibid*, para. 13.

⁷⁰⁹ Delegate Yasseen from Iraq, *ibid*, para. 26.

⁷¹⁰ *Ibid*.

⁷¹¹ Hartman, “Derogation from Human Rights Treaties”, 10.

⁷¹² Lillich, “The Paris Minimum Standards”, 1072.

⁷¹³ *Ibid*, 1075. Yet, this does not necessarily indicate that all non-derogable rights are basic or hierarchically superior to others. It can be that some of them are, but there is still room for others that are non-derogable for some other reasons.

fundamental rights or extended to all rights unlikely to require suspension during emergencies.⁷¹⁴ For instance, certain states insisted that non-derogable rights should include those concerning arrest, imprisonment for failure to fulfil a contractual obligation, emigration, fair trial and juridical personality,⁷¹⁵ while others found provisions regarding the right to marry or the protection of minority languages as simply irrelevant to issues of state security⁷¹⁶.

The final agreement is reflected in the derogation clauses, which specify the non-derogable rights, though, as previously noted, these vary significantly across different treaties. For instance, Article 15 of the ECHR provides that no derogation is allowed in respect of:

- the right to life (Article 2);
- the prohibition of torture, or inhuman or degrading treatment or punishment (Article 3);
- the prohibition of slavery or servitude (Article 4(1));
- the prohibition of retrospective criminal law (Article 7).⁷¹⁷

Later, with the adoption of Protocol No. 7, the right not to be tried or punished twice (*ne bis in idem*) has been added to the non-derogable list of rights⁷¹⁸ and Protocol No. 13 joined the abolition of the death penalty⁷¹⁹. This list, dating back to 1950, remains the shortest one. The rationale behind the so-called “caution” exercised by the Convention’s drafters can also be viewed through the lens of the assumed scepticism among member States, stemming from the fact that an extended list of non-derogable rights would likely encroach upon their sovereignty.

Explicit reasoning on why certain rights are non-derogable is rarely provided by the ECtHR, hence, its case-law offers limited insight on this matter. For instance, the ECtHR’s Guide on Article 15 does not address the underlying reasons for non-derogability, but it does state that its second paragraph “protects certain fundamental rights in the Convention from any derogation”⁷²⁰. The only clarification it provides concerns the effect of Article 15 and the corresponding non-derogation clauses in the Protocols, namely that the rights to which they refer continue to apply during any time of war or public emergency, irrespective of any derogation.⁷²¹ In addition, it is underlined that the (pinpoint) exceptions already

⁷¹⁴ Hartman, “Derogation from Human Rights Treaties”, 9.

⁷¹⁵ Such as France, see Hartman, “Derogation from Human Rights Treaties”, 9. See also, UN Economic and Social Council, Commission on Human Rights, *Draft International Covenant of Human Rights, Article 4, paragraph 2, France: Amendment to the United Kingdom Amendment*, U.N. Doc. E/CN.4/324 (13 June 1949), 1.

⁷¹⁶ Iraq delegate, see UN General Assembly, *18th Session, Third Committee, Summary Record of the 1261st Meeting*, UN Doc. A/C.3/SR.1261 (1963), 258–259.

⁷¹⁷ Article 15 of the ECHR, para. 2.

⁷¹⁸ Article 4, Council of Europe, *Protocol No. 7 to the European Convention on Human Rights*, 22 November 1984, European Treaty Series No. 117..

⁷¹⁹ Articles 1 and 2, Council of Europe, *Protocol No. 13 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty in All Circumstances*, 3 May 2002, European Treaty Series No. 187.

⁷²⁰ ECtHR, *Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency*, 31 August 2024, para. 3.

⁷²¹ *Ibid*, para. 40.

contained in certain rights will also continue to apply, thus any deprivation of life will not be in contravention of the ECHR if it results from the use of force which is no more than absolutely necessary in the circumstances set out in Article 2, but Article 15 in its second paragraph adds the additional exception that the right to life will not be violated if the death results from a lawful act of war.⁷²² Equally, Article 7, which prohibits punishment without law, shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.⁷²³ It is precisely because of the exceptional provisions in the second paragraphs of Articles 2 and 7 that some authors argued the only rights under the ECHR that can be strictly characterised as fundamental and inalienable are those guaranteed by Article 3 and Article 4(1).⁷²⁴

As far as the ICCPR is concerned, no derogation is allowed from

- the right to life (Article 6);
- the prohibition of torture, or inhuman or degrading treatment or punishment (Article 7);
- the prohibition of slavery or servitude (Article 8 (paras. 1 and 2));
- the prohibition of imprisonment for inability to fulfil a contract (Article 11);
- the prohibition of retrospective criminal law (Article 15);
- the right to juridical personality (Article 16);
- the freedom of thought, conscience and religion or belief (Article 18);
- the abolition of death penalty (Article 6 of the Second Optional Protocol to the ICCPR).⁷²⁵

Siracusa Principles reiterated that no state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion and that these rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.⁷²⁶

In addition, it is emphasised that states, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction and to adopt measures to secure an effective remedy for violations, as envisioned under Article 2 of the ICCPR, shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extrajudicial killings or involuntary

⁷²² *Ibid*, para. 42.

⁷²³ *Ibid*, para. 43.

⁷²⁴ Sir James Edmund Sandford Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Oxford University Press, 1969), 250 as cited in Higgins, *Themes and Theories*, 481.

⁷²⁵ Article 4, para. 2, UN, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, 171.

⁷²⁶ UN Economic and Social Council, *Siracusa Principles*, para. 58.

disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.⁷²⁷ Finally, it is stated that the ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.⁷²⁸

Sommario suggested that the discrepancy in non-derogable rights stems either from the time gap between the adoption of various human rights instruments, or the differing rationales behind the inclusion of specific rights into the catalogue.⁷²⁹ While some rights may have been deemed essential for safeguarding individuals in emergency situations,⁷³⁰ others may have been included because their suspension cannot be justified in times of crisis.⁷³¹ Several scholars have also adopted a similar line of reasoning. For Tolera, while the list of non-derogable rights in Article 4 of the ICCPR relates to the question of whether certain rights, like the right to life, freedom from slavery, or freedom from torture, are of a *jus cogens* nature, other rights appear on the list for different reasons, such as because their suspension is either irrelevant in addressing a state of emergency or outright impossible.⁷³² For example, a state cannot justify imprisonment for debt or suspend freedom of thought, conscience, and religion to manage an emergency.⁷³³ Additionally, Tolera claimed that some rights are non-derogable also because they reflect other obligations that states have under international law.⁷³⁴ These include obligations envisaged under other human rights treaties and instruments in the area of international humanitarian law, including for instance, the minimum guarantees found in the common Article 3 of the 1949 Geneva Conventions and in the two 1977 Additional Protocols.⁷³⁵ In any case, states that are parties to multiple treaties protecting different non-derogable rights should respect all such rights to fulfil the requirement to honour their other obligations under international law, which is contained in every derogation clause.⁷³⁶ This is analogous to the stance that if one state is party to both the ECHR and the ICCPR, but submits its derogation notification only to the Secretary-General of the CoE and not UN, its derogation cannot be deemed entirely lawful, as it breaches its other obligations under international law, and that is to notify UN bodies under the ICCPR as well. Similarly, even though the state chooses for instance to derogate only under the ECHR, it still means that it should respect rights that are not derogable under the

⁷²⁷ *Ibid*, para. 59.

⁷²⁸ *Ibid*, para. 60.

⁷²⁹ Sommario, "Derogation from Human Rights Treaties", 342.

⁷³⁰ For the view that certain rights are of such high importance that no derogation is permitted, see for instance Emmerson, Ashworth, Macdonald, *Human Rights and Criminal Justice*, 62.

⁷³¹ Sommario, "Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters," 342. See also Joan F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision", *Human Rights Quarterly* 7, no. 1 (1985): 113-114.

⁷³² Tolera, "Absence of Derogation Clause", 237.

⁷³³ *Ibid*.

⁷³⁴ *Ibid*.

⁷³⁵ *Ibid*, 236.

⁷³⁶ Similar view can be found in Harris, O'Boyle, Bates, Buckley, *Law of the European Convention*, 828; Flinterman, "Derogation from the Rights", 1067. Yet, Flinterman remarked that it is unlikely in practice for the ECtHR to find violation of Article 15 of ECHR due to measures that are inconsistent with Article 4 of the ICCPR, *ibid*.

ICCPR, even though they are derogable under the ECHR, in order not to breach its other obligations under international law.

The view that a right may be non-derogable for reasons beyond its fundamental value may also find support in the positions of the HRC. It clarified that the enumeration of non-derogable rights “is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law”.⁷³⁷ Moreover, it added that “the proclamation of certain provisions of the Covenant as being of a non-derogable nature [...] is to be partly seen as recognition of the peremptory nature of some fundamental rights”, but that “some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency”.⁷³⁸ The referenced formulations indicate that the HRC was not prepared to classify specific norms as peremptory, but it did highlight certain examples of norms that can *never become necessary to derogate*, namely the prohibition of imprisonment for inability to fulfil a contract from Article 11 and the freedom of thought, conscious and religion guaranteed under Article 18.⁷³⁹

Nevertheless, to illustrate how even monitoring bodies are not entirely certain on the exact nature and rationale behind non-derogable rights, it is worth reminding that this position contradicts the stance that the same body had taken several years earlier in its General Comment on Article 18, where it explicitly stated that the *fundamental character* of freedom of thought, conscience, and religion is “reflected in the fact that this provision cannot be derogated from, even in time of public emergency”.⁷⁴⁰

Thus, it remains unclear whether the freedom in question is non-derogable owing to its principal importance or simply because it would never be necessary to derogate from it.

The idea that derogation of this right would never be required may stem from the fact that the only aspect of the freedom that can practically be derogated is its external part (*forum externum*), whereas derogation of its internal one (*forum internum*) is factually impossible. Since Article 18 already includes a limitation clause regarding its *forum externum*, that states can use in both ordinary and emergency situations, derogation from Article 18 truly appears to be unnecessary. However, this requires bringing Article 19 into the conversation, as its first paragraph, which guarantees the right to hold opinions without interference, is equally practically impossible to derogate, as it remains entirely within an individual’s internal sphere.⁷⁴¹ Yet, it is not listed among the ICCPR’s non-derogable rights. Therefore, not only is it a plausible argument that Article 18 is designated as non-derogable due to the fundamental significance of the freedom it safeguards, but also demonstrate a mishmash of confused HRC’s views regarding this rather important topic.

Furthermore, in another General Comment addressing whether reservations to the non-derogable provisions of the Covenant would be compatible with its object and purpose, the HRC explained that “while there is no hierarchy of

⁷³⁷ HRC, CCPR General Comment No. 29, para. 11.

⁷³⁸ *Ibid.* The same paragraph can be found in HRC, CCPR General Comment No. 29, para. 11.

⁷³⁹ *Ibid.*

⁷⁴⁰ HRC, CCPR No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (30 July 1993), para. 1.

⁷⁴¹ This is likely why the HRC claimed that freedom of thought and conscience, the freedom to have or adopt a religion or belief (Article 18) and the freedom to hold opinions without interference (Article 19) are protected unconditionally. HRC, CCPR General Comment No. 22, para. 3.

importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency”, which “underlines the great importance of non-derogable rights”.⁷⁴² However, the Committee noted that “not all rights of profound importance, such as Articles 9 and 27 of the Covenant, have in fact been made non-derogable”.⁷⁴³ It clarified that a reason why some rights has been made non-derogable could be is because “their suspension is irrelevant to the legitimate control of the state of national emergency”, citing Article 11 as an example.⁷⁴⁴

Another reason, according to the HRC, is that “derogation may indeed be impossible”, as is the case with freedom of conscience.⁷⁴⁵ Finally, the HRC acknowledged that “some provisions are non-derogable exactly because without them there would be no rule of law”.⁷⁴⁶ Accordingly, a reservation to Article 4, which defines the balance between state interests and individual rights during emergencies, would fall into the category of reservations offending the “object and purpose” test. The same applies to certain non-derogable rights—such as the prohibitions on torture and arbitrary deprivation of life—which cannot be reserved due to their status as peremptory norms, thus, while there is no automatic correlation between reservations to non-derogable provisions and those that contradict the Covenant’s object and purpose, a State bears a significant burden in justifying such reservations.⁷⁴⁷ This is yet another instance where the HRC identified different underlying reasons behind classifying rights as non-derogable, in a somewhat inconsistent and unsystematic manner.⁷⁴⁸

As if all of this was not perplexing enough, HRC added that the given list in Article 4 should not be considered exhaustive and interpreted it to encompass several other rights that are not explicitly mentioned in the derogation clause.

It provided “illustrative examples” of the provisions that cannot be “subject to lawful derogation”, namely:

- the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Article 10), which, as explained by the HRC, reflects a norm of general international law protecting inherent dignity, hence it is closely tied to non-derogable Article 7;
- the prohibitions against taking of hostages, abductions, or unacknowledged detention, that are also part of general international law norms;⁷⁴⁹

⁷⁴² HRC, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, para. 10.

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*, para. 10.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

⁷⁴⁸ Koji, “Emerging Hierarchy”, 922.

⁷⁴⁹ In this regard, the HRC also added that even though Article 9 of the ICCPR is not included in the list of non-derogable rights, there are limits on state’s power to derogate, namely, they must ensure that derogations do not exceed those strictly required by the exigencies of the actual situation. Furthermore, HRC underlined that the fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by Article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. Finally, the procedural guarantees protecting liberty of person may never be made subject to

- elements of the international protection of the rights of persons belonging to minorities, due to the prohibition of genocide under international law, the incorporation of a non-discrimination clause in Article 4, para. 1 of the ICCPR, and the non-derogable status of Article 18;
- the prohibition of the deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present (which constitutes a crime against humanity), as confirmed by the Rome Statute of the ICC;
- provision requiring that any propaganda for war shall be prohibited by law, as well as that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (Article 20);⁷⁵⁰
- the obligation to provide effective remedy for violations of the provisions of the Covenant (Article 2, para. 3);⁷⁵¹
- provisions of the Covenant relating to procedural safeguards and judicial guarantees (stemming from Article 14 and 15), in order to secure the protection of non-derogable rights;⁷⁵²
- certain elements of the right to a fair trial that are explicitly guaranteed under international humanitarian law during armed conflict, including that only a court of law may try and convict a person for a criminal offence, the presumption of innocence and the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, in order to respect the principles of legality and the rule of law.⁷⁵³

What is more, the HRC recalled that provisions related to non-discrimination are not listed among the non-derogable provisions in Article 4, but stated that “there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances”, and the prohibition of discrimination “must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant”.⁷⁵⁴ This stance is also supported by some scholars, claiming that the principle of non-discrimination cannot be derogated from in any circumstances, as evidenced by its explicit mention in the validity requirements of the derogation clause itself.⁷⁵⁵

The drafters of the ACHR had the benefit of the opportunity to consult earlier-drafted human rights treaties and composed a rather different form of the derogation article, as

measures of derogation that would circumvent the protection of non-derogable rights and in order to protect those rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measure of derogation, HRC, *CCPR General Comment No. 35, Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, paras. 65-67.

⁷⁵⁰ HRC, *CCPR General Comment No. 29*, para. 13.

⁷⁵¹ *Ibid*, para. 14.

⁷⁵² *Ibid*, para. 15.

⁷⁵³ *Ibid*, para. 16.

⁷⁵⁴ *Ibid*, para. 8.

⁷⁵⁵ El-Rashed, “Derogation in Time of Emergency”, 18.

compared to those in the ECHR and the ICCPR. According to Article 27 of the ACHR, there shall be no suspension of:

- the right to juridical personality (Article 3);
- the right to life (Article 4);
- the right to humane treatment (Article 5);
- the freedom from slavery (Article 6);
- the prohibition of retrospective criminal law (Article 9);
- the freedom of conscience and religion (Article 12);
- rights of the family (Article 17);
- the right to a name (Article 18);
- rights of the child (Article 19);
- the right to nationality (Article 20);
- the right to participate in government (Article 23);
- the judicial guarantees essential for the protection of such rights.

Regarding the last non-derogable right, the Commission requested the Court to offer guidance on specific Convention articles when “read in conjunction with the final clause of Article 27(2)” to determine whether habeas corpus and certain judicial safeguards could be suspended in times of crisis.⁷⁵⁶ In effect, the Commission sought clarification on how the wording “judicial guarantees essential for the protection of such rights” in the second paragraph on non-derogable clause impacted the derogability of the right to judicial protection (Articles 25) and the right to personal liberty (Article 7), both of which are derogable according to the ACHR.⁷⁵⁷ The Court concluded by advising that “the legal remedies guaranteed in Articles 7(6) and 25(1) of the Convention may not be suspended” as it considered them to espouse “amparo” and therefore essential to protecting those rights that cannot be suspended under Article 27(2).⁷⁵⁸

The same wording was part of another advisory opinion, initiated by Uruguay with the aim of defining the term “essential” and how the derogation clause relates to Article 25 and Article 8 regarding judicial protection and due process of law, which are not included in the list of non-derogable rights.⁷⁵⁹ Drawing on the previously described opinion and the overarching principles of the ACHR, the Court reaffirmed its view that robust judicial oversight during times of crisis is vital to safeguarding non-derogable human rights, even

⁷⁵⁶ IACtHR, “Habeas Corpus in Emergency Situations”, paras. 9-11.

⁷⁵⁷ *Ibid*, para. 12.

⁷⁵⁸ *Ibid*, paras. 42-44. Article 7(6) reads as follows: “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies”, while Article 25(1) stipulates that “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

⁷⁵⁹ IACtHR, “Judicial Guarantees in States of Emergency”, Advisory Opinion OC-8/87, para. 2.

when provisions that explicitly mandate judicial involvement may, on the face of the Convention, be subject to suspension.⁷⁶⁰

Taken together, these opinions effectively resulted in the conclusion that certain rights, though formally derogable under the ACHR, were rendered non-derogable through a broad interpretation of the term “judicial guarantees”.⁷⁶¹

Regarding the nature of non-derogable rights, the IACtHR held that non-derogability does not concern a “‘suspension of guarantees’ in an absolute sense”, nor the “suspension of rights” themselves, as these rights are inherent to human beings; rather, it is only their “full and effective exercise” that may be suspended or limited.⁷⁶²

The tendency to expand the list of non-derogable rights steadily continued over time, with the Arab Charter leading the field with sixteen non-derogable articles.⁷⁶³ This instrument considers as non-derogable many elements of the right to fair trial, the right to habeas corpus, freedom from double jeopardy, the right to compensation for damages suffered by an indigee as the outcome of a trial in which he is found innocent, the prohibition to arbitrarily or unlawfully prevent anyone from leaving any country, including their own, or to be compelled or forbidden to reside in any part of that country, and the right to seek political asylum.⁷⁶⁴

Since the scope of non-derogable rights varies across different legal instruments, it becomes, at least theoretically, relevant to consider whether non-derogation clauses, particularly Article 4 of the ICCPR, have become part of customary international law, especially given how widely the treaty has been ratified around the world. This question is especially pertinent for states that have not yet ratified the ICCPR.⁷⁶⁵

After reviewing derogation clauses in light of general principles of international law, Hartman concluded that they cannot be regarded neither as anomaly nor as a reflection of customary law.⁷⁶⁶ However, considering that her position dates back more than four decades, it is disputable whether she would be of the same opinion nowadays.

Some scholars contended that Article 4 has indeed acquired customary international law status, arguing that states often “pay lip service” to this provision, as evidenced by the notifications submitted to the UN Secretary-General, and that its list of non-derogable rights includes core human rights regarded as peremptory norms binding on all states without exception.⁷⁶⁷

⁷⁶⁰ *Ibid*, para. 31

⁷⁶¹ Gross and Ní Aoláin, *Law in Times of Crisis*, 259.

⁷⁶² IACtHR, “Judicial Guarantees in States of Emergency”, Advisory Opinion OC-8/87, para. 18.

⁷⁶³ Article 4, para. 2 of the Arab Charter.

⁷⁶⁴ Sommario, “Derogation from Human Rights Treaties”, 343.

⁷⁶⁵ Such as Bhutan, Brunei Darussalam, China, Comoros (which is party to the African Charter, though its lack of a derogation clause limits its implications), Cook Islands, Cuba, Kiribati, Malaysia, Micronesia, Myanmar, Nauru, Niue, Oman, Palau, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, and the United Arab Emirates, see UN Human Rights Treaty Bodies, Body Database, Ratification Status for CCPR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (accessed 23.3.2025).

⁷⁶⁶ Hartman, “Derogation from Human Rights Treaties”, 11.

⁷⁶⁷ Tolera, “Absence of Derogation Clause”, 276.

Even if that is not so, the fact that some rights are repeatedly included in the catalogues of non-derogable rights could reflect the existence of *opinio juris*, which is one of the elements necessary for the development of customary legal norms, which may form at least in regard to those specific rights. Other rights incorporated into later treaties, by contrast, may be viewed, as some scholars suggest, as part of the “progressive development” of international law.⁷⁶⁸

This is especially compelling given that states actually rely and engage with the derogation regime.⁷⁶⁹ From the perspective that publicly notifying and justifying the suspension of human rights can expose a state to findings or judgments of treaty violations, it might appear more pragmatic for states to avoid both legal and political risks by opting to suspend rights domestically without formally invoking derogations.⁷⁷⁰ Nevertheless, they still accept this possibility and rely on the regime, which may indicate its customary status.

2.2.4. *The Silent Covenant: ICESCR and the Absence of the Derogation Clause*

The choice to establish two separate covenants, each focusing on a specific category of rights – the ICCPR and the ICESCR – rather than a single comprehensive treaty was largely driven by Cold War-era ideological divides, where Western countries favoured civil and political rights as encompassing immediate obligations, whereas Eastern bloc prioritised economic, social, and cultural rights, treating them as goals to be realised over time.⁷⁷¹

However, the ICESCR does not contain derogation clause, even though when the General Assembly requested from the Commission on Human Rights to draft two covenants, it specified that they should contain as many similar provisions as possible.⁷⁷² For Higgins, this was an implicit confirmation that such a clause should be considered necessary only when strong implementation mechanisms are in place.⁷⁷³

According to Helfer, the ICESCR serves as an outstanding illustration of the gradual evolution of human rights treaties.⁷⁷⁴ He found the primary reason for the lack of a derogation clause to be the inherently flexible and accommodating nature of state

⁷⁶⁸ Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2008), 388.

⁷⁶⁹ This was not the case during the COVID-19 pandemic, when only a small number of states derogated from the ICCPR or regional human rights treaties. However, this limited use of derogations does not necessarily reflect state practice of disregarding the institute of derogation, but rather may indicate that this type of human rights restriction was not deemed necessary to address the crisis.

⁷⁷⁰ Laurence R. Helfer, “Rethinking Derogations from Human Rights Treaties,” *American Journal of International Law* 115, no. 1 (2021): 2.

⁷⁷¹ All Answers Ltd., “The Two UN Covenants on Human Rights,” *Law Teacher*, 2013, <https://www.lawteacher.net/free-law-essays/international-law/the-two-un-covenants-on-human-rights-international-law-essay.php?vref=1> (accessed 15.06.2025)

⁷⁷² Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights* (OHCHR, 1996), 2.

⁷⁷³ Higgins, *Themes and Theories*, 286.

⁷⁷⁴ Helfer, “Rethinking Derogations”, 30.

obligations under the ICESCR, along with the existence of a general limitations clause that applies uniformly to both emergency and regular circumstances.⁷⁷⁵

That general limitation clause is embedded in the Article 4 stating that “the States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”⁷⁷⁶. Apart from this, substantive articles of the ICESCR do not contain special limitation clauses that can be found in the ICCPR.

The absence of a derogation clause in the ICESCR obviously leaves room for speculations regarding the underlying reasons. Alston and Quinn propose that this may have stemmed from a combination of factors, including:

(1) the nature of rights contained in the Covenant which makes the need to derogate from, for instance, the right to food or health care, seems less compelling than from the right to peaceful assembly or the right to vote;

(2) the general limitation clause contained in Article 4 of ICESCR;

(3) the inherent flexibility and adaptability of the basic obligation outlined in Article 2, paragraph 1 of the ICESCR.⁷⁷⁷

All of this, especially the broad obligation to “progressively realise” economic, social, and cultural rights, along with the general limitation clause, offer states ample flexibility to address public emergency.⁷⁷⁸

The redundancy of a derogation clause in treaties covering the second generation of human rights may be further supported by the fact that no State party to the European Social Charter has ever invoked article F that authorises derogation in times of public emergency.⁷⁷⁹

⁷⁷⁵ Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly* 9, no. 2 (May 1987): 217. See also Matthew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995), 27.

⁷⁷⁶ Article 4 of the ICESCR.

⁷⁷⁷ Alston and Quinn, *Nature and Scope*, 217.

⁷⁷⁸ *Ibid*, 217–219.

⁷⁷⁹ Article F stipulates that:

“1. In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

3. The Secretary General shall in turn inform other Contracting Parties and the Director General of the International Labour Office of all communications received in accordance with paragraph 2 of this article. Council of Europe, *European Social Charter*, ETS 35, 18 October 1961, See also Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 294.

On the other hand, the obligation under Article 2, paragraph 1 of the ICESCR to realise Covenant rights “to the maximum of available resources” may be significantly constrained in disasters that severely weaken a state’s ability to provide basic assistance, hence expecting full implementation of economic, social and cultural rights during a state of emergency that devastates infrastructure and strains financial resources appears unrealistic.⁷⁸⁰

This opens the question whether derogation from this treaty is possible even in the absence of derogation clause. Those claiming that it is not, thus that the treaty remains completely applicable at all times, rely on the *pacta sunt servanda* rule embedded in the VCLT, indicating that if the instrument does not allow for suspension, its provisions must be upheld and executed in good faith, unless circumstances exist that preclude wrongfulness.⁷⁸¹ On the other hand, there are views that the suspension of human rights treaties that lack explicit derogation provisions should still be guided by the same substantive conditions that govern derogation clauses, among which the most important one is respecting certain core fundamental rights that can never be derogated.⁷⁸²

In that regard, Committee on Economic, Social and Cultural Rights (CESCR) recognised minimum essential levels of rights to food, water, housing, and health as “core obligations” that are non-derogable and must be upheld even in times of conflict, emergencies, and natural disasters.⁷⁸³ In other words, states are required to guarantee the fulfilment of minimum essential levels for each of the specified rights.⁷⁸⁴ The CESCR has identified the perimeter of “core obligations” for many economic and social rights, explicitly highlighting the existence of a nucleus of non-derogable rights.⁷⁸⁵ These interpretations constrain states’ ability to restrict these rights, even during crises that severely deplete financial resources and weaken institutional support for social programs.⁷⁸⁶

Truth be told, this was the result of development in the reasoning of the Committee, since in its early days it seemed willing to tolerate non-compliance with minimum core obligations, as long as a state could prove that it had made every effort to utilise all available resources to prioritise fulfilling those obligations.⁷⁸⁷ This difference is likely due to the time gap between the general comments, hence could be explained by the maturing of the

⁷⁸⁰ Sepúlveda, *The Nature of the Obligations*, 296.

⁷⁸¹ Such stances could be found in Alston and Quinn, *Nature and Scope*. See also Sommaro, “Derogation from Human Rights Treaties”, 344.

⁷⁸² *Ibid*, 347. See also Sepúlveda, *Nature of the Obligations*, 302-304.

⁷⁸³ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, Statement, UN Doc. E/C.12/2001/10, 10 May 2001, para. 18; United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, UN Doc. E/C.12/1/Add.59, 12 December 2001.

⁷⁸⁴ CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, para 10.

⁷⁸⁵ CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN Doc. E/C.12/2000/4, 11 August 2000, para 47. See also CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, 20 January 2003, para 40.

⁷⁸⁶ Helfer, “Rethinking Derogations”, 30.

⁷⁸⁷ CESCR, *General Comment No. 3*, para 10.

Committee's understanding of the absolute nature of certain Covenant obligations has become more firmly established.⁷⁸⁸

In any case, ICESCR does not stand lonely in the company of treaties not containing a derogation clause. Many crucial international documents, from the UN Convention on the Elimination of All Forms of Discrimination against Women or the UN Convention on the Rights of the Child to the UN Convention on the Elimination of All Forms of Racial Discrimination remain silent on this matter. Whether these instruments can be derogated from during times of emergencies is a legal conundrum, raising difficult questions of state responsibility, treaty law, and the nature of the obligations they impose on states.⁷⁸⁹

2.3. What Could Be Next for This Legal "Escape Room"?

The complexity of derogation mechanism has been demonstrated and its importance for human rights protection highlighted, together with the existing shortcomings and challenges. For instance, due to ongoing delays, tribunals often take years to assess the legality of derogations, sometimes only after the measures have been lifted or they don't assess it at all, particularly when there are no individual complaints.⁷⁹⁰

For instance, Laurence R. Helfer noticed how the attitude of states towards this mechanism has changed over time. He identified three phases in states' approach, noting that from the 1950s to the late 20th century, few states utilised derogations, whereas its use increased significantly in the second period following the 9/11 attacks.⁷⁹¹ Numerous governments invoked emergency measures in response to transnational terrorism, often extending them for years and resulting in so-called "permanent emergencies".⁷⁹² However, not all countries that imposed restrictions on rights during this period invoked the derogation mechanism under international treaties to justify their actions.⁷⁹³ The COVID-19 pandemic marked the most recent period,⁷⁹⁴ and although it exemplified the type of crisis for which human rights derogations are intended,⁷⁹⁵ more countries implemented emergency measures rather than formally invoking derogations, even among states party to the same treaty facing similar health threats.⁷⁹⁶ As if that was not enough, COVID-19 measures have often infringed upon non-derogable rights, including the right to life, the

⁷⁸⁸ Sommaro, "Derogation from Human Rights Treaties", 349.

⁷⁸⁹ *Ibid*, 343.

⁷⁹⁰ Helfer, "Rethinking Derogations", 27.

⁷⁹¹ *Ibid*, 23-24.

⁷⁹² *Ibid*, 24.

⁷⁹³ *Ibid*.

⁷⁹⁴ *Ibid*.

⁷⁹⁵ Alan Greene, "States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic", Strasbourg Observers, 1 April 2020, <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/> (accessed 15.06.2025).

⁷⁹⁶ Helfer, "Rethinking Derogations", 21. He stated that there were around thirty derogating countries, whereas more than one hundred imposed some form of human rights restrictions, *ibid*, 24.

prohibition of torture and forced labour.⁷⁹⁷ Therefore, he concluded that the derogation regime, intended to regulate human rights suspensions through international oversight, has had so far only a limited impact.⁷⁹⁸

Seen from this perspective, it is not unexpected that a large number of human rights treaties still do not include derogation clause or offer some alternative for suspension of rights during emergencies.⁷⁹⁹

Still, considering the significance of this mechanism, it should be continued with introducing possible alternations for improvement. Helfer suggested certain changes, including integrating the obligation to submit derogation notices into domestic law, issuing nonbinding guidelines from international experts, and involving treaty depositories in discussions with governments on the justification and scope of emergency rights suspensions.⁸⁰⁰

Similarly, James Nickel offered some interesting suggestions for reforms, but firstly, a few lines on his angle.

He distinguished between two models of the framework for human rights emergencies (FHRE), one of which—the type-oriented model (T-O)—focuses on identifying and classifying different emergency types, such as disasters, epidemics, riots, terrorist attacks, and civil wars, to evaluate the human rights compliance of the measures implemented for their management and recovery.⁸⁰¹ The idea is that different types of emergencies pose unique challenges and should be regulated by distinct norms, thus he argued that certain aspects of international human rights and humanitarian law already follow this approach in addressing severe crises.⁸⁰² Such a model would facilitate training of emergency managers and responders.⁸⁰³

The second, undifferentiated model (UD), which closely resembles the existing FHREs in international human rights law, does not differentiate between types of emergencies, and aside from designating certain rights as non-derogable, avoids establishing general rules or principles for emergency management.⁸⁰⁴ Nickel was critical of the existing emergency frameworks, because they tend to focus too heavily on restrictions regarding state actions, while they should instead highlight positive rights and state responsibilities during crises.⁸⁰⁵ He pointed out that they largely overlook the effects on economic and social rights and

⁷⁹⁷ Kanstantsin Dzehtsiarou, “COVID-19 and the European Convention on Human Rights,” *Strasbourg Observers*, March 27, 2020, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/> (accessed 15.06.2025).

⁷⁹⁸ Helfer, “Rethinking Derogations”, 25.

⁷⁹⁹ *Ibid*, 29.

⁸⁰⁰ *Ibid*, 40.

⁸⁰¹ Nickel, “Two Models of Normative Frameworks”, 57.

⁸⁰² *Ibid*, 57. For instance, he clarified that the Geneva Conventions provide a type-oriented approach to emergencies, particularly in large-scale conflicts, distinguishing between international and civil wars, *ibid*, 65. When it comes to human rights treaties, the ECHR is the most type-oriented. The ICCPR does not explicitly mention war, nor does it in Article 6 specify exceptions allowing the use of deadly force in certain situations, such as riots. Similarly, in Article 9, it does not explicitly permit detention to prevent disease spread, which are all norms that could be found in the ECHR, *ibid*, 60-61.

⁸⁰³ *Ibid*, 72.

⁸⁰⁴ *Ibid*, 57.

⁸⁰⁵ *Ibid*, 66.

emphasised that different emergencies impact human rights in various ways, hence that they may require distinct responses.⁸⁰⁶ Nonetheless, different types of emergencies can frequently intersect, such as a severe earthquake leading to an epidemic, as seen with cholera in Haiti, or a tsunami resulting in a nuclear crisis, as occurred in Japan.⁸⁰⁷ Moreover, new types of emergencies may arise, like cyberattacks that could, for example, lead to major crises by severely disrupting a nation's electrical grid.⁸⁰⁸ Ultimately, identifying a specific type of an emergency, such as an insurrection, does not effectively predict its severity.⁸⁰⁹

One of the major advantage of the T-O model is its ability to approach derogation differently from existing treaties by tailoring the scope of non-derogable rights to the severity of the emergency, making more rights non-derogable in less severe crises and classifying them into two groups: those that remain non-derogable under all circumstances and those that may only be derogated in specific types of emergencies.⁸¹⁰ Unlike the T-O model, the UD model provides governments with flexibility but lacks clear guidelines and depends on post-crisis evaluations.⁸¹¹ Nevertheless, the UD model aligns with the principle of subsidiarity in international law by granting governments considerable discretion in managing major emergencies.⁸¹²

Accordingly, Nickel advocated for improvement of current FHRE and gradual transition to hybrid frameworks that integrate type-orientation, while recognizing that responses should vary based on the emergency's nature.⁸¹³

3. Limitations of Human Rights

During the drafting negotiations for both the ECHR and ICCPR, proponents of clearly defined derogation clauses incorporated broad limitation clauses into substantive provisions of the treaties, which reflected the view that individual rights must have realistic limits, allowing restrictions for reasons such as "national security" or "public safety".⁸¹⁴ Nonetheless, supporters of derogation clauses considered these clauses inadequate for emergency situations,⁸¹⁵ resulting in the distinction between two separate types of human right restrictions.

Thus, the second type is enabled by the so-called limitation clause, which may be incorporated into the provision ensuring a specific right. When these limitation clauses are

⁸⁰⁶ *Ibid*, 66-67. Take for example epidemics and pandemics, since diseases spread in different ways, thus travel restrictions might be suitable for individuals infected with Ebola but not for those with malaria, *ibid*, 67.

⁸⁰⁷ *Ibid*.

⁸⁰⁸ *Ibid*.

⁸⁰⁹ *Ibid*, 72.

⁸¹⁰ *Ibid*, 70.

⁸¹¹ *Ibid*, 75.

⁸¹² *Ibid*.

⁸¹³ *Ibid*, 80.

⁸¹⁴ UN Commission on Human Rights, *126th Meeting*, 2-10, see also Hartman, "Derogation from Human Rights Treaties", 6.

⁸¹⁵ Hartman remarked that they failed to provide compelling reasons for such a stance, Hartman, "Derogation from Human Rights Treaties", 6.

present, governments may partially restrict the enjoyment of a right, but only to achieve a specified legitimate aim, such as protecting national security, public order, or public morals and health and only to the extent “necessary in a democratic society”. These restrictions are also sometimes called “facultative limitations”, since it is optional for states to decide whether they are going to use them or not,⁸¹⁶ or the related rights are labelled “qualified rights” because they may be “subject to exceptions”.⁸¹⁷ They may also, quite appropriately, be referred to as “*ad hoc* limitations” since they occur occasionally, whenever needed in everyday life and regular circumstances.⁸¹⁸ In other words, rights may sometimes conflict with other rights, interests, or considerations, requiring that their relative importance be weighed in a given situation and determined which one should be restricted in favour of the other. For Sir Hersch Lauterpacht it was axiomatic that an individual’s natural rights are inherently restricted by the natural rights of others.⁸¹⁹ So, the underlying idea behind this type of restrictions recognises that rights are exercised within a community, where all members hold equal entitlements, hence sometimes they need to endure certain restrictions in order to achieve a balance between various interests. Expectedly, the legislature will primarily be the one to determine which rights should be subject to balancing and for which legitimate aims,⁸²⁰ but the results of such balancing will always be open to review by national or international courts.

There are also other systematisations of these categories that can be found in the literature. As an example, Oscar Garibaldi differentiated between direct limitations, which are part of the very definition of a right to which they apply and indirect limitations, permitted by “specific limitation clauses”, that outline conditions under which states may impose limitations on the right to which those clauses apply (analysed in this section).⁸²¹ As an illustration of direct limitation, Garibaldi cited Article 5, para. 1 of the ICCPR, which states that “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant”, with an additional explanation that the clause includes not only acts and activities aimed at the destruction of rights (preparatory acts), but also those that actually destruct them.⁸²²

3.1. The ECHR Approach to Limited Rights

In any case, some scholars noted that it was in accordance with the modern trends for human rights treaties not to include a general limitation clause, as was the case with

⁸¹⁶ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 69.

⁸¹⁷ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315. Trapp uses the notion of exceptions in a very specific sense, contrasting it to exemptions.

⁸¹⁸ This term was suggested to the author of this thesis by Vassilis P. Tzevelekos, for which the author is immensely grateful.

⁸¹⁹ Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950), 366.

⁸²⁰ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315.

⁸²¹ Oscar M. Garibaldi, “The Limitation and Derogation Clauses,” in *U.S. Ratification of the International Covenants on Human Rights*, eds. Hurst Hannum and Dana D. Fischer (New York: Transnational Publishers; Leiden: Brill Nijhoff, 1993), 128-130.

⁸²² *Ibid*, 129-130.

Universal Declaration, but rather to specifically identify rights that can be limited.⁸²³ In that regard, ECHR opted for the right to respect for private and family life (Article 8), freedom to manifest one's religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11) and freedom of movement (Article 2, Protocol No. 4). Compared to the ICCPR, the ECHR has adopted a more systematic approach to regulating limitations, as all limitation clauses follow a similar normative scheme and contain the same (underdeterminate)⁸²⁴ concepts, such as "in accordance with the law" or "necessary in democratic society",⁸²⁵ whose precise meaning is being clarified through legal practice.

To begin with, limitations must be "in accordance with the law" or "prescribed by law", meaning that there must be some basis in domestic law for the interference.⁸²⁶ This requirement, also denoted as the principle of legality,⁸²⁷ safeguards the rule of law and helps ensure that any state interference with human rights retains a measure of democratic legitimacy.⁸²⁸ The Court has traditionally accepted a broader understanding of law, accepting that it covers not only statutes, but also bylaws and other acts,⁸²⁹ as well as unwritten law, due to common law Member States.⁸³⁰ Thus, all forms of substantive law are encompassed, including statutes, regulations, custom and judicial precedents.⁸³¹ What truly matters is the quality of law, that demands it to be adequately accessible, ensuring that citizens can reasonably understand the legal rules relevant to a given case and that a rule is drafted with enough precision to enable individuals to regulate their conduct, *i.e.*, to anticipate – if need be with appropriate advice and to a degree that is reasonable in the circumstances – the consequences of their actions (foreseeability).⁸³² While this is highly desirable, excessive rigidity can hinder adaptability, as the law must evolve with changing circumstances, while absolute certainty is unattainable.⁸³³ Essentially, the law must align with the principles of the rule of law, ensuring that domestic legal provisions offer protection against arbitrary interference by public authorities with individual rights.⁸³⁴ States are given a degree of discretion in fulfilling this requirement, yet the law must clearly define the extent of this discretion and how it is exercised, taking into account the legitimate

⁸²³ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 70.

⁸²⁴ For more on indeterminate and underdeterminate language in law see Bojan Spaić, *Priroda i determinante sudijskog tumačenja prava* (Pravni fakultet Univerziteta u Beogradu, 2020), 122; Bojan Spaić, "Institucionalno rješavanje problema semantičke neodređenosti u pravnom tumačenju", *Savremeni problem pravne i političke filozofije* (2016): 126-131.

⁸²⁵ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 70.

⁸²⁶ ECtHR, *The Sunday Times v. UK*, App. No. 6538/74, Judgment from 26 April 1979, para. 47. See also ECtHR, *Silver and Others v. UK*, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, Judgment of 25 March 1983, para. 86.

⁸²⁷ See Garibaldi, "Limitation and Derogation Clauses", 131.

⁸²⁸ Marauhn, Strobel, "Limitations and Restrictions of Rights", 430.

⁸²⁹ ECtHR, *Silver and Others v. UK*, para. 88.

⁸³⁰ ECtHR, *The Sunday Times v. UK*, para. 47.

⁸³¹ Garibaldi, "Limitation and Derogation Clauses", 133.

⁸³² ECtHR, *The Sunday Times v. UK*, para. 49.

⁸³³ *Ibid*, para. 49.

⁸³⁴ ECtHR, *Malone v. UK*, App. No. 8691/79, Judgment of 2 August 1984, para. 67.

aim of the measure and the need to ensure that individuals are adequately protected from arbitrary interference.⁸³⁵

All limitation clauses in ECHR are the same in that they require that limitations must be “necessary in a democratic society”. Hartman contended that this phrase narrows broad legitimate aims like national security and public order, preventing potential repression, since the ECtHR has ruled that it is for the national authorities to make the initial assessment of the reality of the “pressing social need implied by the notion of necessity”.⁸³⁶ It underlined that the term “necessary” should be differentiated from the expression “absolutely necessary” mentioned in Article 2 or Article 6 of the ECHR, or “strictly necessary” standard from Article 15 of the ECHR, and that it does not grant the same flexibility as, for instance, the adjectives “ordinary” from Article 4 or “reasonable” from Article 5 or Article 6.⁸³⁷ To assess whether the limitation was “necessary”, the Court must examine whether the interference in question addressed a “pressing social need”, whether it was “proportionate to the legitimate aim pursued”, and whether the justifications provided by national authorities were “relevant and sufficient”.⁸³⁸ States are granted broad, but not unlimited margin of appreciation, both in regard to its legislator, which “prescribes by law” and national bodies that interpret and apply those laws.⁸³⁹ It is ultimately worth mentioning that long ago Commission has clarified that these are all exceptions to the general rule – the protection of freedom, and that the exception cannot be applied so that the freedom is completely suppressed, but only insofar as it is necessary to preserve the values protected by legitimate aims, which are exhaustively enumerated in every limitation clause.⁸⁴⁰ Furthermore, the Commission dismissed the idea that the freedoms guaranteed under the ECHR are conferred by the state, with a certain discretion (afforded to it by limitation clause) in determining their boundaries, since such an interpretation would imply that the state defines limits of these freedoms, contradicting the fundamental concept of freedom as a sphere of activity originally free from state interference.⁸⁴¹ Final word goes to the ECtHR, not only regarding the aim of the measure at hand, but also its “necessity”, which is in line with a European supervision.⁸⁴² This principle of democratic content, as Garibaldi called it, demands that the content of every limitation is in line with the principles of a democratic society.⁸⁴³ The Court attached particular importance to the principles of a “democratic society” and demands of pluralism, tolerance and broadmindedness, from which it follows that any interference must be proportionate to the legitimate aim pursued.⁸⁴⁴

The principle of proportionality enables the ECtHR to balance all relevant circumstances, especially taking into account the intensity of infringement and whether the essence of the

⁸³⁵ *Ibid*, para. 68.

⁸³⁶ ECtHR, *Handyside v. UK*, para. 48.

⁸³⁷ *Ibid*, para. 48.

⁸³⁸ ECtHR, *The Sunday Times v. UK*, para. 62.

⁸³⁹ ECtHR, *Handyside v. UK*, paras. 48-49.

⁸⁴⁰ ECommHR, *Handyside v. UK*, Report of the Commission, Adopted on 30 September 1975, para. 137.

⁸⁴¹ ECommHR, *Times Newspaper LTD. and others v. UK*, App. No. 6538/74, Report of the Commission, Adopted on 18 May 1977, para. 193.

⁸⁴² ECtHR, *Handyside v. UK*, para. 49.

⁸⁴³ Garibaldi, “Limitation and Derogation Clauses”, 142.

⁸⁴⁴ ECtHR, *Handyside v. UK*, para. 49.

right has been infringed.⁸⁴⁵ Marauhn and Strobel identified in the practice of ECtHR and HRC three sub-tests within the proportionality test – the test of suitability or effectiveness, the least-intrusive-means test and the means-ends test or necessity test.⁸⁴⁶ In the language of Aharon Barak, apart from proper purpose, there must be a rational connection indicating that the limiting measure is suitable to achieve intended aim and the necessity test must be satisfied, meaning that the legitimate aim could not have been achieved through a less restrictive alternative.⁸⁴⁷ Since the necessity test is not a balancing test,⁸⁴⁸ the final step is “proportionality *stricto sensu*” (often called “proportionality in the narrow sense”⁸⁴⁹ or just “balancing”), which dictates a balancing of the advantages of the measure against the severity of the limitation of right and to ascertain whether these advantages outweigh (thus, justify) the limitation.⁸⁵⁰ Translated to the ECtHR reasoning, greater the extent of the infringement or the more essential the limited aspect of the right, the stronger and more compelling the legitimate aim must be.⁸⁵¹

One of the issues inherent to the proportionality test is in that the analysis of appropriateness is unavoidably subjective, since there is no objective standard for weighing rights, interests and values.⁸⁵² Due to the fact that balancing, which is at the core of proportionality analysis, revolves around values and subjective judgments, it remains the

⁸⁴⁵ Aalt Willem Heringa and Leo Zwaak, “Right to Respect for Privacy (Article 8)”, in *Theory and Practice of the European Convention on Human Rights*, eds. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Intersentia, 2006), 747. Some authors differentiated between different types of proportionality, or for instance between proportionality and balancing, with the latter being inherent to the SCOTUS reasoning regarding constitutional rights, see Marauhn, Strobel, “Limitations and Restrictions of Rights”, 431. Bernhard Schlink also remarked that some literature portrayed balancing as the overarching framework for proportionality analysis, while other sources described it as merely the final stage of the proportionality assessment, see Bernhard Schlink, “Proportionality”, in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 721. Alessio Sardo explained that the term “proportionality” carries two distinct meanings – one as a balancing test and the other as a (meta-)principle that underlines all balancing operations. In the first sense, proportionality refers to a three-pronged approach for resolving conflicts between rights, where the first step assesses whether the measure is suitable, the second evaluates its necessity and the final determines the relation of conditional precedence between the conflicting rights or principles. In the second sense, proportionality functions as a broad principle requiring that any interference with a human right be commensurate (proportionate) in relation to the legitimate aim pursued by the legislator. Sardo continued to claim that the proportionality test in the first sense applies only to specific categories of speech, whereas proportionality as a meta-principle guides all balancing decisions of the ECtHR. For instance, regarding the freedom of expression (which was the subject of his analysis), different proportionality tests were identified, such as what he labelled as “the necessity test”, “the rational basis test”, “definitional balancing” or “strict scrutiny”. See Alessio Sardo, “Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights,” *Canadian Journal of Law & Jurisprudence* 33, no. 1 (2020): 4-8.

⁸⁴⁶ Marauhn, Strobel, “Limitations and Restrictions of Rights”, 431.

⁸⁴⁷ Aharon Barak, *Proportionality – Constitutional Rights and Their Limitation* (Cambridge University Press, 2012), 245-371. Schlink underlined that determine whether an alternative measure is less intrusive is a value judgment, Schlink, “Proportionality”, 724.

⁸⁴⁸ Barak, 2012, 338.

⁸⁴⁹ Schlink, “Proportionality”, 724.

⁸⁵⁰ Barak, *Proportionality*, 340.

⁸⁵¹ Aalt Willem Heringa and Leo Zwaak, 747.

⁸⁵² Bernhard Schlink, “Proportionality in Constitutional Law: Why Everywhere but Here?,” *Duke Journal of Comparative and International Law* 22, no. 2 (2012): 299.

most debated step.⁸⁵³ Barak encountered this challenge by claiming that the answer is to analyse the relevant case law, assess the status of the conflicting rights and interests and evaluate their broader societal importance within the framework of societal values and ultimately, to determine the relative importance of the conflicting rights and interests within the given scale of values.⁸⁵⁴ Another solution, as Schlink duly noted, would be Robert Alexy's "weight formula", a three-step approach requiring to firstly assess the detriment one side would suffer if the other prevails, then the detriment to the opposing side if the first were to succeed and finally, to determine whether the significance of one side's victory justifies the detriment to the other.⁸⁵⁵ Schlink found a common line in that both Barak and Alexy relied on judicial discretion.⁸⁵⁶

Proportionality is a complex principle, allowing for different interpretations and modifications,⁸⁵⁷ and these are the main reasons why national authorities, including all three branches of power, are granted certain discretion powers in conducting such an analysis. The prescription of limitations on certain rights is reserved to the legislature, which is democratically legitimised to make subjective determinations in pursuit of the common good.⁸⁵⁸ Subsequently, national courts will apply it on a case-by-case basis, as factual assessments may vary and balancing of rights and interests may differ, depending on the context.

Those discretion powers are embedded in the doctrine of margin of appreciation, developed by the ECtHR, which is founded, in part, on the idea that there is no consensus at the European or international level regarding the importance of public interest, and particularly human rights, so the state's perspective should carry some weight when its legislation is challenged for allegedly imposing a disproportionate limitation on a human right protected by international treaties.⁸⁵⁹ ECtHR has even explicitly stated that the requirements of morals varies from time to time and from place to place, hence "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these (limiting) requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them".⁸⁶⁰ For James Fawcett, the margin of appreciation takes the middle ground between what a democratic society deems necessary and what is objectively required to achieve a legitimate aim.⁸⁶¹

⁸⁵³ Schlink, "Proportionality", 724.

⁸⁵⁴ Barak refers to the national level, but it is equally applicable to the international one. See Aharon Barak, "Proportionality and Principled Balancing", *Law and Ethics of Human Rights*, 4(1), 7–8 (1–16); Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006), 164-176.

⁸⁵⁵ Alexy suggested using a scale that categorises the degree of realisation as low, moderate, or high to facilitate comparison, weighing, and balancing between the competing interests, Robert Alexy, "The Construction of Constitutional Rights", *Law and Ethics of Human Rights*, 4(1), 28–30 (21–30). See also Schlink, 2012a, 725.

⁸⁵⁶ Schlink, "Proportionality", 725.

⁸⁵⁷ Schlink, "Proportionality in Constitutional Law", 301.

⁸⁵⁸ *Ibid*, 300.

⁸⁵⁹ Barak, *Proportionality*, 418. Truth be told, he did find difference between these two concepts, with the principle of proportionality dealing with the factual and normative data relevant at the national level and the margin of appreciation focusing on those relevant to the international law treaties, see, *ibid*, 420.

⁸⁶⁰ ECtHR, *Handyside v. UK*, para. 48.

⁸⁶¹ Fawcett, *The Application of the European Convention*, 248.

Legitimate aims are very similar in these provisions but not identical. The right to respect for private and family life (Article 8 of the ECHR) can be limited in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others,⁸⁶² whereas the limitation clause of Article 9 of the ECHR is framed somewhat more narrowly.⁸⁶³ The freedom to manifest one's religion legitimate aims can be limited only for the protection of public safety, public order, health or morals, or rights and freedoms of others. The exercise of freedom of expression (Article 10 of the ECHR) may be subject to such formalities, conditions, restrictions or penalties in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. As seen, apart from the broadest group of general limitations, drafters added at least three, specific ones that are closely related to the nature of the right at hand. Interference with freedom of assembly and association (Article 11 of the ECHR) can be justifiable only for the most common ones and those are the interests of national security or public safety, prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Finally, freedom of movement (Article 2 of Protocol No. 4 to the ECHR) shall bear no limitations apart from those in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. However, this Article contains another limitation, allowing for the right to be subject "in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society". Evidently, this limitation needs to be "justified" but not "necessary in a democratic society", which is a lower standard than provided for in the previous paragraph.⁸⁶⁴ Nevertheless, the proportionality test still applies, but it is less strict and grants the state broader discretion powers regarding the limitations applicable to particular areas, such as, for instance, closing them for public due to military purposes or prevention of smuggling or for the economic welfare related reasons.⁸⁶⁵

In any case, the Commission was clear in that the principle of strict interpretation should be applied to all of these broad concepts,⁸⁶⁶ meaning that no other criteria apart from those enumerated in the limitation clause can be the basis for limitation, as well as that those criteria should be understood in their ordinary meaning, leaving no room for the concept of "implied limitations".⁸⁶⁷

⁸⁶² Peculiarly enough, ICCPR does not envisage limitation clause in regard to this right.

⁸⁶³ Higgins, *Themes and Theories*, 486.

⁸⁶⁴ Marinković, Krstić, *Evropsko pravo ljudskih prava*, 174-175.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ ECommHR, *Times Newspaper LTD. and others v. UK*, para. 195.

⁸⁶⁷ *Ibid.*, para. 194. To cite the Commission, "strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning". Referring to the *Golder case*, it reminded that these restrictive formulations left no room for the concept of implied limitations, *ibid.*

Assessment of all these requirements, including the meaning of the legitimate aims, is conducted during the deliberation on the merits rather than the admissibility stage.⁸⁶⁸

Lastly, limitations must not be introduced for discriminatory purposes or enforced in a discriminatory manner, hence any difference in treatment must have objective and reasonable justification.⁸⁶⁹

3.2. The ICCPR Framework of Limited Rights

For the ICCPR, limited are the right to liberty of movement and freedom to choose own residence (Article 12), freedom to manifest one's religion (Article 18), the right to freedom of expression (Article 19), the right of peaceful assembly (Article 21) and the right to freedom of association (Article 22), while the publicity of trial (Article 14) and the right to public participation (Article 25) should also be mentioned.

However, in the ICCPR, inconsistent terminology is evident as well, with "provided by law"⁸⁷⁰ being used along with "prescribed by law"⁸⁷¹. Fortunately, Siracusa Principles offered interpretative principles, which outline the meaning of these concepts, stating that limitations should be provided for by national law of general application which is consistent with the ICCPR and in force at the when time the limitation is applied,⁸⁷² and not arbitrary or unreasonable.⁸⁷³ Legal norms limiting the exercise of human rights shall be clear and accessible to everyone,⁸⁷⁴ and adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations.⁸⁷⁵

Then, for an unknown reason, only Articles 14, 21 and 22 use the phrase "necessary in a democratic society", whereas Articles 12, 18 and 19 mention solely "necessary to protect", followed by prescribed legitimate aims. However, the Siracusa Principles clarified that "whenever a limitation is required in the terms of the Covenant to be 'necessary', this term implies that the limitation:

- (a) is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant;
- (b) responds to a pressing public or social need;
- (c) pursues a legitimate aim; and

⁸⁶⁸ ECtHR, *De Becker v. Belgium*, App. No. 214/5, Judgment of 27 March 1962, para. 11. See also Higgins, *Themes and Theories*, 470.

⁸⁶⁹ ECtHR, *Carson and Others v. UK*, App. No. 42184/05, Judgment of 16 March 2010, para. 61.

⁸⁷⁰ See Articles 12 and 19.

⁸⁷¹ See Articles 18 and 22.

⁸⁷² UN Economic and Social Council, *Siracusa Principles*, 7, para. 15.

⁸⁷³ *Ibid*, 7, para. 16. It may be worth noting that Garibaldi claimed that these phrases were not synonyms and that "in conformity with the law" indicated a requirement of moderate certainty, whereas "prescribed by law" and "provided by law" suggested that limitation laws must be highly certain, Garibaldi, "Limitation and Derogation Clauses", 133.

⁸⁷⁴ UN Economic and Social Council, *Siracusa Principles*, 7, para. 17.

⁸⁷⁵ *Ibid*, 7, para. 18.

(d) is proportionate to that aim.”⁸⁷⁶

In addition, any assessment as to the necessity of a limitation shall be made on objective considerations.⁸⁷⁷ Obviously, proportionality is also one of the recognised conditions concerning the limitation mechanism, for which Siracusa Principles specified that “in applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation”.⁸⁷⁸

Moreover, the expression “in a democratic society” is said to impose a further restriction on the limitation clauses it qualifies,⁸⁷⁹ and the burden is upon a state to demonstrate that the limitations do not impair the democratic functioning of the society.⁸⁸⁰ Acknowledging that there is no universal model for a democratic society, it is stipulated that a society that upholds and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights can be considered to fit this definition.⁸⁸¹

Apart from that, the burden of justifying a limitation upon a right lies with the state.⁸⁸² The scope of a limitation shall not be interpreted so as to jeopardise the essence of the right concerned,⁸⁸³ but in favour of the rights at issue,⁸⁸⁴ and they should not be applied in an arbitrary manner.⁸⁸⁵ Ultimately, no limitation shall be discriminatory.⁸⁸⁶

When it comes to legitimate aims, the right of peaceful assembly (Article 21) and the right to freedom of association (Article 22) can be limited if that is necessary to protect all possible aims under Covenant – national security or public safety, public order, public health or morals or the rights and freedoms of others, whereas the right to movement (Article 12) and the right to freedom of expression (Article 19) can be limited for reasons of national security, public order, public health or morals or the rights and freedoms of others, thus for some reason public safety is omitted in these provisions.

Finally, limitation of the freedom to manifest one’s religion (Article 18) is constrained only to protect public safety, public order, health or morals or the *fundamental* rights and freedoms of others, so without mentioning national security. Notably, this is the only place in the ICCPR that uses the qualifier “fundamental” rights of others, possibly to underline how limitation can be justifiable if and only if this right is contrasted against some other important right, but the exact meaning of this qualifier remains disputable. Worth noting is

⁸⁷⁶ *Ibid*, 6, para. 10.

⁸⁷⁷ *Ibid*.

⁸⁷⁸ *Ibid*, 6, para. 11. During the drafting of the ICCPR, the United States emphasised how states should avoid enforcing limitations on the exercise of rights whenever that is possible, even though such limitations are allowed under the ICCPR, see Garibaldi, “Limitation and Derogation Clauses”, 131. Still, it remains disputable whether that is even conceivable from the perspective of the proportionality requirement. To put it differently, it is hardly plausible that the situation where the state limited a right despite having the option not to do so, would be deemed proportional.

⁸⁷⁹ UN Economic and Social Council, *Siracusa Principles*, 7, para. 19.

⁸⁸⁰ *Ibid*, 7, para. 20.

⁸⁸¹ *Ibid*, 7, para. 21.

⁸⁸² *Ibid*, 7, para. 12.

⁸⁸³ *Ibid*, 6, para. 2.

⁸⁸⁴ *Ibid*, 6, para. 3.

⁸⁸⁵ *Ibid*, 6, para. 7.

⁸⁸⁶ *Ibid*, 6, para. 9.

that the same qualifier cannot be found in the ECHR, even though legitimate aims are the same in both texts vis-à-vis this particular right. Thus, it remains unclear whether there is any intention behind these terminological differences, or this is just some sort of normative sloppiness. In any case, Siracusa Principles revealed that “the requirement that any restrictions must be consistent with other rights recognised in the Covenant is implicit in limitations to the other rights recognised in the Covenant”,⁸⁸⁷ yet this clarification is itself also unclear and has done little to resolve these terminological ambiguities.

What is more, the publicity of trial (Article 14) can be limited for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the parties so requires. So, the Covenant opted to specify the last reason, instead of using the broad term of rights of others, meaning not all rights have the capacity to prevail over this one, just the right to privacy, if other conditions are met, which is understandable from the point of view that the publicity of trial is an important trait of any democratic society that ensures transparency and accountability and encourages public confidence in the legal system. On the other hand, it is still disputable why public health was omitted, since it is imaginable that there could be a need to exclude public from a trial due to a transient epidemic that is not of such a large scale to be proclaimed as state of emergency. After all, if all other limitation clauses contain this reason, it does not seem convincing that this one should not.

Lastly, the most peculiar limitation clause is in Article 25, which guarantees the right to public participation “without unreasonable restriction”, so not specifying anything else.

Back to the freedom to manifest one’s religion and the fact that national security is not mentioned among the reasons, a question arises as to what these vague concepts even mean. Once again, Siracusa Principles offered some clarification in that regard.

3.2.1. Legitimate Aims – Underdeterminate Concepts

National security refers to the protection of the existence of the nation or its territorial integrity or political independence against force or threat of force,⁸⁸⁸ but not to prevent merely local or relatively isolated threats to law and order.⁸⁸⁹

On the other hand, public safety represents protection of persons from danger, especially their life or physical integrity, or serious damage to their property.⁸⁹⁰ As with the national security, this legitimate aim cannot be used in order to impose vague or arbitrary limitations and there need to be adequate safeguards and effective remedies against abuse.⁸⁹¹ Truth be told, there does not seem to be a clear line between national security and public safety, as the analysed treaties often use the two terms interchangeably. Various interpretations of these terms found in legal doctrine further support this claim. For instance, Garibaldi argues

⁸⁸⁷ *Ibid*, 7, para. 13.

⁸⁸⁸ *Ibid*, 8, para. 29.

⁸⁸⁹ *Ibid*, 8, para. 30. It is also articulated that the systemic violation of human rights undermines true national security and may jeopardise international peace and security and that a state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population, *ibid*, 8, para. 32.

⁸⁹⁰ *Ibid*, 9, para. 33.

⁸⁹¹ *Ibid*, 8, 9, paras. 31, 33.

that national security appears to refer to external threats, while public safety pertains to internal ones.⁸⁹²

Public order is defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded, including respect for human rights.⁸⁹³ It should be interpreted in the context of the purpose of the limited right.⁸⁹⁴ Interestingly enough, Egon Schwelb argued that “public order” in the European Convention refers to the absence of disorder, whereas in the ICCPR, it has a broader meaning akin to public policy, making the scope of the limitation clause wider in the latter.⁸⁹⁵ He supported this view with the claim that the ICCPR does not explicitly mention a state’s right to license visual or auditory devices under Article 19, whereas this right is expressly stated in Article 10 of the ECHR, concluding that Covenant’s public order should be interpreted more broadly.⁸⁹⁶ On the other hand, James Fawcett maintained that in both document, the term refers to prevention of local breaches of peace.⁸⁹⁷

As for public health, it refers to serious threat to the health of the population or individual members of the population, hence measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.⁸⁹⁸

Recognizing that it is not possible to define public morality, since it evolves with time and differs by culture, it is required that a state invoking this legitimate aim shall demonstrate that the limitation is essential to the maintenance of respect for fundamental values of the community.⁸⁹⁹ While states have certain margin of discretion in this regard, they still need to respect the prohibition of discrimination.⁹⁰⁰

At last, Siracusa Principles indicated that the scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant,⁹⁰¹ as well as that when a conflict exists between a right protected in the Covenant and one which is not, it should be taken into account that the Covenant seeks to protect the most fundamental rights and freedoms.⁹⁰² What is more, the document is explicit in that especial weight should be afforded to rights not subject to limitations,⁹⁰³ which, in turn, constitutes further evidence that there is a hierarchy among human rights, one that is obviously value-oriented.

⁸⁹² Garibaldi, “Limitation and Derogation Clauses”, 138.

⁸⁹³ UN Economic and Social Council, *Siracusa Principles*, 7, para. 22. The notion is used in a wider sense akin to the French civil law concept of “ordre public”, see Garibaldi, “Limitation and Derogation Clauses”, 138.

⁸⁹⁴ UN Economic and Social Council, *Siracusa Principles*, 8, para. 23.

⁸⁹⁵ Egon Schwelb, “The International Covenants on Human Rights”, in *International Protection of Human Rights: Nobel Symposium 7*, eds. Asbjørn Eide and August Schou (Oslo: Universitetsforlaget; New York: St. Martin’s Press, 1981), 114–115.

⁸⁹⁶ *Ibid.*

⁸⁹⁷ Fawcett, *The Application of the European Convention*, 208.

⁸⁹⁸ UN Economic and Social Council, *Siracusa Principles*, 8, para. 25.

⁸⁹⁹ *Ibid.*, 8, para. 27.

⁹⁰⁰ *Ibid.*, 8, para. 28.

⁹⁰¹ *Ibid.*, 8, para. 35.

⁹⁰² *Ibid.*, 8, para. 36.

⁹⁰³ *Ibid.*, 8, para. 36.

Relying on Higgins, Hartman claimed that there are remarkable differences not only between limitation clauses in different treaties, but also between different articles of the same treaty.⁹⁰⁴ As an example, she noticed that the broad protection of privacy against “arbitrary or unlawful interference” in Article 17 of the ICCPR versus the specific grounds for limiting peaceful assembly in Article 21 of the ICCPR.⁹⁰⁵ Hartman also insisted that the derogation clauses, by confining derogations to emergencies that threaten the life of the nation and requiring the measures to be strictly required are more restrictive than the broad limitation clauses.⁹⁰⁶ Precise and objective language of derogation clauses combined with obligations regarding notification, ensures that governments cannot unilaterally determine the balance between individual and community rights without external scrutiny, whereas, the vagueness of limitation clauses allows monitoring bodies to adopt a more deferential stance when assessing government decisions.⁹⁰⁷

3.3. The ACHR Perspective on Limited Rights

Like other comprehensive human rights instruments, the ACHR also includes several limitation clauses, which delineate the conditions under which certain rights may be balanced against collective interests. Freedom of thought and expression guaranteed under Article 13 of the ACHR may be subject to subsequent imposition of liability, which must be “expressly established by law” to the extent necessary to ensure respect for the rights or reputations of others or to protect national security, public order, or public health or morals. Evidently, this limitation clause does not mention “necessary in a democratic society”. The IACtHR stated that this Article is drafted in a markedly different manner from Article 10 of the ECHR, which is framed in broad terms and emphasised that without the explicit reference to “necessary in a democratic society” in the latter, defining the list of permissible restrictions would be far more challenging.⁹⁰⁸ Notably, Article 19 of the ICCPR, which partly influenced Article 13 of the ACHR, outlines a significantly shorter list of restrictions than the ECHR, while the ICCPR itself is more restrictive than its American counterpart, particularly as it does not explicitly prohibit prior censorship.⁹⁰⁹

The IACtHR also emphasised the importance of the principle of proportionality, referring explicitly to the stands given by the ECtHR in its case law, especially regarding the “pressing social need”, which is equally applicable to the ACHR.⁹¹⁰

Simply put, this monitoring body accepted all of standards developed by ECtHR regarding limitation clauses, from principles inherent in a democratic society to the

⁹⁰⁴ Hartman, “Derogation from Human Rights Treaties”, 6.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *Ibid.*

⁹⁰⁸ IACtHR, “Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)”, Advisory Opinion OC-5/85, 13 November 1985, requested by the Government of Costa Rica, para. 45.

⁹⁰⁹ *Ibid.*

⁹¹⁰ *Ibid.*, para. 46.

requirement that limiting measures must be proportional to the legitimate aim sought.⁹¹¹ Therefore, the courts and treaty monitoring bodies overseeing the international human rights law treaties examined in this study evaluate proportionality in a similar manner, by examining the rational link between the restriction and a legitimate aim, assessing whether it is the least restrictive means available, and applying proportionality *stricto sensu* by determining if the harm inflicted on the individual outweighs the benefits of achieving that objective.⁹¹²

Right of assembly from Article 15 of the ACHR allows limitations imposed “in conformity with the law” and necessary in a democratic society in the interest of national security, public safety, or public order, or to protect public health or morals or the rights or freedoms of others. Article 16 of the ACHR upholds freedom of association, providing for limitations “established by law” and necessary in a democratic society to protect national security, public safety or public order, or public health or morals, or the rights and freedoms of others. The exercise of freedom of movement and residence under Article 22 of the ACHR may be limited “pursuant to law” to the extent necessary in democratic society to prevent crime or to protect national security, public safety, public order, or public health, public morals, or the rights or freedoms of others. At last, Article 32 of the ACHR is particularly interesting, since in its second paragraph it offers something that resembles a general limitation clause, stating that the rights of each person are limited by the rights of others, by the security of the general welfare, in a democratic society.

In any case, the way in which ACHR system approach limitation clauses closely align with that of the ECHR, especially regarding the principles of legality, legitimacy, and proportionality. However, due to its longer history and a greater number of member states, the ECHR has developed a more extensive body of case law, while the ACHR will continue to develop, hopefully with ongoing discussion and close examination that are essential to preserving the integrity of human rights.

3.4. An Exceptional Case: Limited Rights in the African System

Finally, the claw-back clauses, which has been described as a distinctive aspect of the African Charter, can also be interpreted as limitation clauses. They permit the breach of an obligation by limiting rights *ab initio*, through the inclusion of specific formulations, such as: “within the law” in Article 9 of the ACHPR,⁹¹³ or “provided that he abides by the law” in Article 10⁹¹⁴ of the ACHPR. Instances also include “except for reasons and conditions previously laid down by law” in Article 6 of the ACHPR, “subject to law and order” in Article 8 of the ACHPR,⁹¹⁵ or “subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethnics and

⁹¹¹ IACtHR, *Case of “The Last Temptation of Christ” (Olmedo – Bustos et al.) v. Chile*, Judgment of 5 February 2001, para. 69.

⁹¹² Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 309. See also for instance HRC, *CCPR General Comment No. 27: Freedom of Movement (Article 12 of the ICCPR)*, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 14 in reference to the freedom of movement.

⁹¹³ “Every individual shall have the right to express and disseminate his opinions within the law”.

⁹¹⁴ “Every individual shall have the right to free association provided that he abides by the law”.

⁹¹⁵ “Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms”.

rights and freedoms of others” in Article 11⁹¹⁶ of the ACHPR. Tolera perceived the absence of a phrase “necessity in a democratic society” from the Charter’s claw-back clauses as if it does not change their nature but instead leaves the extent of permissible interference open to interpretation.⁹¹⁷

Main criticism against such clauses boils down to their potential to effectively nullify or significantly limit the very rights they purport to protect, together with the fact that the Charter uses them extensively.⁹¹⁸ Some even claim that they render certain rights meaningless.⁹¹⁹ Marauhn and Strobel denounced them because “they tend to mix private and public interests” and “blur the distinction between the scope of protection of a human right and the permissibility of limitations and restrictions”.⁹²⁰ However, it is uncertain how do claw-back clauses blend public and private more than limitation clauses do, when the latter also allow limiting rights for the sake of different both private and public considerations and open the door for their balancing.

In any case, numerous African governments have been known to employ retroactive legislation to advance their authoritarian objectives, with claw-back clauses serving as a convenient mechanism for these practices, especially since they rely so heavily on national laws as framework for possible limitations.⁹²¹

Nevertheless, the ACommHPR specified that national law, for instance, cannot set aside the right to express and disseminate opinion, because this would make the protection of the right ineffective, as well as that allowing national law to precede over the international law would defeat the purpose of the rights and freedoms enshrined in the Charter.⁹²² It underlined that any limitation on the rights must be in conformity with the provisions of the Charter.⁹²³ What is more, the only legitimate reasons for limitations are to be found in Article 27 of the Charter, which lays down that rights and freedoms “shall be exercised with due regard to the rights of others, collective security, morality and common interest”.⁹²⁴ Not only must limitations be founded in a legitimate state interest, but also “evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained”⁹²⁵ and most importantly, consequence of a limitation must never render the rights itself illusory.⁹²⁶

⁹¹⁶ “Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others”.

⁹¹⁷ Tolera, “Absence of Derogation Clause”, 243.

⁹¹⁸ For more, see Loveness Mapuva, “Negating the Promotion of Human Rights Through “Claw-Back” Clauses in the African Charter on Human and People’s Rights”, *International Affairs and Global Strategy* 51 (2016), 2.

⁹¹⁹ V.O.O. Nmehielle, “Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question”, *Human Rights Quarterly* 26, no. 3 (2004): 730-759, as cited in Mapuva, “Negating the Promotion of Human Rights”, 2.

⁹²⁰ Marauhn, Strobel, “Limitations and Restrictions of Rights”, 428.

⁹²¹ Mapuva, “Negating the Promotion of Human Rights”, 2.

⁹²² ACommHPR, *Media Rights Agenda and Others v. Nigeria*, para. 66.

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*, para. 68.

⁹²⁵ *Ibid.*, para. 69.

⁹²⁶ *Ibid.*, para. 70.

Finally, the Commission insisted that states cannot avoid its obligations by relying on the limitations and claw-back clauses and upheld that the Charter cannot be invoked to justify violations of its own provisions.⁹²⁷ In other words, although states frequently misuse the Charter's provisions allowing for the limitation of rights, the Commission has taken a sufficiently clear stance to support the conclusion that the Charter's claw-back clauses—despite their broadly indeterminate language—operate in a manner quite similar to limitation clauses in other human rights treaties. However, the full extent of their legal effect remains to be further clarified, ideally through future rulings by international adjudicatory bodies that hold states actually accountable for human rights violations.

3.5. Crisis or Continuity? Drawing the Line Between Derogations and Limitations

To conclude this section on limitations, it should be underlined that the structure of limitation and derogation clauses is, to some extent, similar. Both allow for the exercise of regulatory or executive authority that would otherwise conflict with protected rights and establish legitimate aims, some of which may even overlap.⁹²⁸ For instance, war or a state of emergency can be a basis for derogation, while national security may be invoked to justify limitation, which is another point of intersection between the two.⁹²⁹

That said, they still differ in important ways, since each represent a distinct form of human rights restrictions. Regarding the difference between the “strictly required” standard in the derogation clause and the “necessary in a democratic society” criterion in the limitation clause, several approaches can be identified in the literature. Tom R. Hickman asserted that the “strictly required” standard imposes stricter requirements than the proportionality standard governing limitations.⁹³⁰ Similarly, Trapp recognised a more robust review of necessity of measures under derogation clause than under limitation clause.⁹³¹ In contrast, Neuman took a view that a textual comparison between phrases like “strictly required by the exigencies” and “necessary in a democratic society” reveals more about the poverty of language than explain any practical distinction, except in the focus of the derogation clause on the temporary nature of the restriction, as measures that would be unacceptable if imposed long-term may be justified as brief suspensions of full rights enjoyment.⁹³² Higgins interpreted the stances of the ECtHR, which claimed that “necessary” is not synonyms with “strictly necessary” from Article 15,⁹³³ as if the Court acknowledged a less rigorous test regarding limitations compared to derogations, admitting that she had

⁹²⁷ ACommHPR, *Legal Resources Foundation v. Zambia*, the Commission, Comm. No. 211/98, Decision of 7 May 2001, para. 70. See also Nsongurua J. Udombana, “The Third World and the Right to Development: Agenda for the Next Millennium”, *Human Rights Quarterly* 22, no. 3 (2000), 753.

⁹²⁸ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315.

⁹²⁹ *Ibid.*

⁹³⁰ Tom R. Hickman, “Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism”, *Modern Law Review* 68, no. 4 (2005): 665.

⁹³¹ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315.

⁹³² Neuman, “Constrained Derogation”, 22. Another noticeable difference is that derogation provisions incorporate proportionality through the “strictly required” standard but do not explicitly emphasise democratic values, Hartman, “Derogation from Human Rights Treaties”, 6.

⁹³³ A view given in ECtHR, *Handyside v. UK*, para. 48.

difficulties in understanding reasons for allowing states to restrict rights more easily in regular situations than in a crisis.⁹³⁴ In any case, it seems safe to conclude that the analysis of “strictly required” in the context of derogations overlaps with the proportionality assessment under the limitation clause, but the derogation standard is generally considered more stringent.

Turning now to the perspective of real-world application, these similarities may be practically relevant or even lead to confusion. Namely, in certain instances it may not be entirely clear whether there is a need to derogate, given that most treaties offer the option of limitations, which may be sufficient to respond to certain types (or extent) of crises. For example, such a dilemma must have emerged during the recent pandemic, since two opposed approaches could have been spotted. Since the rights most affected by the imposed measures – those referenced by states in their notifications regarding derogations – already contain “limitation clauses”, they could have been limited instead of completely suspended.⁹³⁵ Now, some claimed that derogation measures were not only unnecessary but also undesirable in case of the pandemic, since human rights treaties, such as ECHR, naturally adapt to emergencies like the COVID-19 crisis, allowing states to operate within their margin of appreciation, which may be wider than usual due to the crisis’s severity, but, once the crisis subsides, this margin will return to its normal scope.⁹³⁶ Conversely, there were arguments that invoking a state of emergency and explicitly recognizing the temporary and unpalatable nature of these measures is a better option, since it would allow other states and international human rights organisations to oversee and, if necessary, regulate the exercise of these powers.⁹³⁷ This should not be understood as implying that transparency, oversight, and supervision are absent under normal circumstances,⁹³⁸ but rather as suggesting that during a declared emergency, scrutiny tends to be stricter due to the usual heightened severity of the situation. Now, during the pandemic, in which human rights held such a fundamental role in the public discourse,⁹³⁹ a considerable number of states opted for derogation, while others continued to operate within bounds of limitations.⁹⁴⁰ It remains odd that states, even parties to the same treaties, responded in such a markedly different manner to the same threat. Nevertheless, given that derogations must be proportionate to the threat they address, suspending rights will often be difficult to justify without first exhausting the option of limitations, where such provisions exist.⁹⁴¹ Derogating measures should, therefore, generally be considered only when existing limitations prove insufficient in addressing the crisis and the need for derogation becomes unequivocal – always as a last resort.⁹⁴²

⁹³⁴ Higgins, *Themes and Theories*, 490.

⁹³⁵ Those are the right to respect for private and family life (Article 8), freedom of assembly and association (Article 11), freedom of movement (Article 2 of Protocol No. 4), protection of property (Article 1 of Protocol No. 1), and the right to education (Article 2 of Protocol No. 1). See Zdravković, “The Affair of “State of Emergency”, 4.

⁹³⁶ Tzevelekos, Dzehtsiarou, “Editorial - Normal as Usual?”, 146. See also Kanstantsin Dzehtsiarou, “COVID-19 and the European Convention”.

⁹³⁷ See Greene, “States should declare a State of Emergency”.

⁹³⁸ Zdravković, “The Affair of “State of Emergency”, 11.

⁹³⁹ Tzevelekos, Dzehtsiarou, “Editorial - Normal as Usual?”, 146.

⁹⁴⁰ Zdravković, “The Affair of “State of Emergency”, 4.

⁹⁴¹ *Ibid*, 4.

⁹⁴² *Ibid*.

4. Implicit Limitations of Human Rights

As previously noted, the last potential category of “human rights restrictions” may be referred to as “implicit limitations”. To say that they are a potential category of restrictions indicates that its very existence is contested in both legal theory and practice and even the bodies within the ECHR system have, at times, approached it in a confusing manner.⁹⁴³

The underlying dilemma is a genuine one since, for instance, the ECHR contains provisions guaranteeing certain rights that, despite being derogable and therefore seemingly neither unrestricted nor absolute in character, does not include an explicit limitation clause. Consequently, the inevitable question arises as to whether—and, if so, how—these rights may be limited.

Scholarly perspectives range from those asserting that only restrictions explicitly permitted by the ECHR are allowed,⁹⁴⁴ to those who, relying on the vagueness and lack of a harmonised normative framework in human rights treaties—particularly the ECHR—interpreted the absence of a limitation clause in certain substantive provisions as an indication that limitations of those rights are not permitted.⁹⁴⁵

Similarly, ECHR bodies were not consistently clear or straightforward with regard to the idea of implied limitations. Take for example the *Golder v. UK* case, where the ECtHR clarified that “the right of access to the courts is not absolute”, since the Convention sets forth this right without its defining in the narrower sense of the term, hence, “there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication”.⁹⁴⁶ On the other hand, in the same judgment, it stated that “the restrictive formulation used at paragraph 2 of Article 8 (‘There shall be no interference ... except such as ...’) leaves no room for the concept of implied limitations”.⁹⁴⁷

Two years later, the European Commission of Human Rights invoked this last dictum, using it to infer the need for a strict interpretation of limitations and, by analogy, to conclude that implied limitations were also not allowed with regard to the Article 10 of the ECHR.⁹⁴⁸

Still, the ECtHR repeated its stance regarding the “right to a court”, a constituent element of the right to a fair trial guaranteed by Article 6, emphasizing that it is “no more absolute in criminal than in civil matters”, as well as that “it is subject to implied limitations”, such as “decision not to prosecute and order for discontinuance of the proceedings”.⁹⁴⁹ Regrettably, the ECtHR added that “it is not the Court’s function, though, to elaborate a general theory of such limitations”.⁹⁵⁰

In a later case, it once again argued that “the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State, regulation which may vary in time and

⁹⁴³ ECtHR, *Golder v. UK*, para. 44.

⁹⁴⁴ Jacobs, *The European Convention*, 198–201, as cited in Higgins, *Themes and Theories*, 463.

⁹⁴⁵ Hartman, “Derogation from Human Rights Treaties”, 7.

⁹⁴⁶ ECtHR, *Golder v. UK*, para. 38.

⁹⁴⁷ *Ibid*, para. 44.

⁹⁴⁸ ECommHR, *Times Newspaper LTD. and others v. UK*, para. 194.

⁹⁴⁹ ECtHR, *Deweert v. Belgium*, App. No. 6903/75, Judgment of 27 February 1980, para. 49.

⁹⁵⁰ *Ibid*.

in place according to the needs and resources of the community and of individuals’”.⁹⁵¹ It went on to explain that “in laying down such regulation, the Contracting States enjoy a certain margin of appreciation”, but “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired” and “limitation will not be compatible with if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.⁹⁵² From this very reasoning, it can be concluded that implicit limitation, whenever permitted, operates in the same manner as limitation (clause), in terms of the need to pursue a legitimate aim and adhering to the proportionality requirement – except, obviously, for the criterion of being explicitly prescribed by law.

The Court relied on its previous line of thought when considering restrictions on the right to education, guaranteed by Article 2 of Protocol No. 1, which does not contain a limitation clause. It clarified that “the right is not absolute, as it may give rise to implicitly accepted limitations”, bearing in mind once again that it “by its very nature calls for regulation by the State”.⁹⁵³ Yet the Court acknowledged that unlike right containing the limitation clause in the ECHR, the *permitted restrictions* of this one, as it called them, are not bound by the exhaustive list of legitimate aims, but that there still must be a reasonable balance between imposed measures and the aim being pursued.⁹⁵⁴ Curiously, the Court underlined that such regulation (limitation) must “never injure the substance of the right”, nor “conflict with other rights enshrined in the Convention”.⁹⁵⁵ Considering that the protection of the rights and freedoms of others is explicitly recognised as a legitimate aim in almost all limitation clauses within the ECHR, it remains unclear from the Court’s stance whether it intended to exclude the protection of other rights as a legitimate aim for limiting the right to education, or whether the Court merely articulated in imprecise terms that such limitations must always tend to be minimised. What is certain, though, is that it has not been clarified which exact legitimate aims would be permissible regarding the implicit limitations.

While deliberating on the right to free elections, including the right to vote and to stand for election, the Court also held that these rights are “not absolute”, as they are recognised “without setting them forth in express terms, let alone defining them”, hence, once again, “there is room for implied limitations”.⁹⁵⁶

In other words, ECtHR will be quite cautious in applying such implied limitations, but they will come into play when the right is framed in general terms, without detailed definition. Assumably, the ECtHR will probably be most receptive to recognise implied limitations in cases where the right itself has been implied by the Court into the text of the

⁹⁵¹ ECtHR, *Ashingdane v. UK*, App. No. 8225/78, Judgment of 28 May 1985, para. 57.

⁹⁵² *Ibid.*

⁹⁵³ ECtHR, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education*, 2024, para. 5. See also ECtHR, *the Belgian Linguistic Case*, App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968, para. 5. When contemplating implied limitations of the right to access to the courts, ECtHR compared it to the right to education, by stating that “these considerations are all the more valid in regard to a right which, unlike the right to education, is not mentioned in express terms”, ECtHR, *Golder v. UK*, para. 38.

⁹⁵⁴ ECtHR, *Leyla Şahin v. Turkey*, App. No. 44774/98, Judgment of 10 November 2005, para. 154.

⁹⁵⁵ ECtHR, *the Belgian Linguistic Case*, para. 5.

⁹⁵⁶ ECtHR, *Mathieu – Mohin and Clerfayt v Belgium*, App. No. 9267/81, Judgment of 2 March 1987, para. 52.

ECHR, or it has recognised a positive obligation of the state,⁹⁵⁷ which necessarily define the content of the right, while simultaneously limiting it. The scope of these limitations was also said to largely depend on the context, particularly the specific nature of the right involved.⁹⁵⁸

Naturally, the fact that implicit limitation may be permissible under the ECHR has little or no bearing on whether such limitations are allowed under other human rights treaties, such as the ICCPR and the ACHR. For example, Article 17 of the ICCPR and Article 11 of the ACHR both prohibit arbitrary or unlawful interference with an individual's privacy, family, home, or correspondence, as well as unlawful attacks on their honour and reputation. While the ACHR uses the term "abusive" instead of "unlawful", neither treaty includes a traditional limitation clause, unlike the ECHR.

In the General Comment No. 16, it was made clear that interference with rights guaranteed under Article 17 of the ICCPR is permissible only when provided for by the law, and that such laws must be consistent with the Covenant's provisions, aims, and objectives.⁹⁵⁹ Additionally, the concept of "arbitrary interference" ensures that even interference provided for by law must be reasonable in the particular circumstances (probably meaning proportional) and consistent with the Covenant.⁹⁶⁰ Therefore, this seems as a plausible basis for arguing that the implicit limitations found in the ECHR might also be applicable to the corresponding rights established under these treaties.

This is even more so, given that the IACtHR has adopted almost the same attitude as the ECtHR regarding the right of access to a court, by stating that it "is not an absolute and therefore may be subject to certain discretionary limitations set by the State", but "the fact remains that the means used must be proportional to the aim sought".⁹⁶¹

To recapitulate, it could be said that implicit limitations, despite their lack of explicit legal grounding, operate analogously to explicit limitation clauses. Specifically, when they are permissible, these implicit limitations must fulfil established standards such as the pursuit of a legitimate aim and compliance with the proportionality test. However, the distinguishing feature remains the absence of an express (international) legal provision authorizing their application, which introduces an additional layer of interpretative complexity and judicial discretion in determining their validity and scope. In other words, it will be up to courts to proclaim whether such limitations are allowed regarding specific rights, which by itself is susceptible to the objection of uncertainty. What is more, as already indicated, it has not been established which precise legitimate aims could justify such implicit limitations, which further complicates the assessment of when and how implicit limitations might legitimately be applied.

⁹⁵⁷ Emmerson, Ashworth, Macdonald, *Human Rights and Criminal Justice*, 94.

⁹⁵⁸ *Ibid*, 93.

⁹⁵⁹ UN Office of the High Commissioner for Human Rights, *CCPR General Comment No. 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para. 3.

⁹⁶⁰ *Ibid*, para. 4.

⁹⁶¹ IACtHR, *Cantos v. Argentina*, Judgment of November 28, 2002, para. 54.

5. Pinpoint Exceptions of Human Rights

Unlike (facultative) limitations, including implicit ones, where the state retains discretion within their margin of appreciation to determine whether and to what extent they will apply them, certain rights are limited permanently, by their very definition, which is why some scholars marked them as “limitations *per definitionem*”.⁹⁶² They referred to those rights that are defined by precise enumeration of cases where the right does not apply.⁹⁶³ While these restrictions are sometimes also referred to as “inherent limitations”,⁹⁶⁴ this terminology is not entirely adequate. It is rather ambiguous, as it does not explain clearly why such limitations are inherent exclusively to these specific rights nor sufficiently distinguishes them from implicit limitations. In other words, the term is occasionally used interchangeably with “implicit limitations”,⁹⁶⁵ risking confusion between these two distinct categories of restrictions.

Trapp described them as “limited rights” and qualified as exemptions, since the recognition of legitimate aims in the exercise of regulatory authority or executive power is built into the scope of the right.⁹⁶⁶ She explained that this approach entails recognizing a human rights interest in broad terms (such as life or liberty) and excluding certain matters from the protection granted by that right, hence when regulatory actions or executive authority operate within the boundaries of such an exclusion, they do not interfere with the protected right.⁹⁶⁷ Given that they fall outside the established “rule”, there is no need to justify them as an “exception”.⁹⁶⁸ In other words, if state’s regulatory measures do not invoke the protected right, they are outside of the rule, thus, according to her, there is no need for “an exception”.⁹⁶⁹

She argued that, in contrast to the ICCPR and the ACHR, the ECHR has, in certain situations, *a priori* established the balance between public interests and individual rights.⁹⁷⁰ However, this view can be challenged, as claiming that establishing a balance between rights and competing interests in advance is highly problematic. It typically requires consideration of the specific context, which can only be assessed on a case-by-case basis. The Convention here actually introduces specific legitimate aims that are different and more narrowly focused compared to those contained in limitation clauses, such as national security or public health. Adjudicating body will still need to analyse whether the conditions of the particular case were proportionate to the legitimate aim that was being

⁹⁶² Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 67. The first systematisation of human rights restrictions in Serbian language was developed by the late Prof. Milan Paunović, and the author wishes to take this opportunity to pay respects to him.

⁹⁶³ *Ibid*, 68.

⁹⁶⁴ *Ibid*, 67.

⁹⁶⁵ Jacobs, *The European Convention*, 198–201, as cited in Higgins, *Themes and Theories*, 463.

⁹⁶⁶ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 308. For a discussion of the distinction between exemptions and exceptions, see Pauwelyn, “Defenses and the Burden of Proof in International Law”, 88.

⁹⁶⁷ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 308.

⁹⁶⁸ *Ibid*, 546.

⁹⁶⁹ *Ibid*, 308. See also, Hage, Waltermann, Arosemena, “Exceptions in International Law”, 11.

⁹⁷⁰ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 308.

pursued by the state, though balancing is more rigorous in this type of restrictions than in case of limitations.⁹⁷¹

Higgins explained her understanding of the issue, by stating that certain “qualifying clauses in ECHR also allow contracting parties to derogate from obligations otherwise incumbent upon them” and that “what is meant here is not interpretative clauses, which indicate certain events which shall not be regarded as within the scope of the obligations but those clauses which excuse States, in certain designated circumstances, from acts that would otherwise be in breach of the Convention” and as an example she cited paragraph 2 of Article 2 and paragraph 3 of Article 4.⁹⁷²

So, the right to life guaranteed under Article 2 of the ECHR, in its first paragraph stipulates that “everyone’s right to life shall be protected by law”, but in the second paragraph states that “deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”⁹⁷³

ECtHR clarified that “Article 2 contains two fundamental elements: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions.”⁹⁷⁴ With complete regard for Trapp’s emphasis on the distinction between exemptions and exceptions, and considering not only the Court’s usage of the term “exceptions” but also its ordinary meaning – a rule or fact prevailing over a more general, contrary rule or fact,⁹⁷⁵ given that they are narrowly tailored, *i.e.*, explicit and pinpointed at precisely defined situations, this thesis proposes referring to this type of human rights restriction as pinpoint exceptions⁹⁷⁶. Even more so, since Trapp also admitted that despite of “a formal difference between exemptions and exceptions as a matter of principle”, “in the international human rights law context the distinction is significantly more fluid, with exemptions bleeding into exceptions insofar as the structure of analysis is concerned”.⁹⁷⁷

Nickel called this category of human rights restrictions “type-oriented exception clause”, allowing states to engage in actions that raise concern from a human rights perspective, particularly with regard to the right to life, due to its non-derogable character.⁹⁷⁸ He emphasised that Article 2 of the ECHR does not specify that the riot or insurrection must be

⁹⁷¹ ECtHR, *McCann and Others v. UK*, para. 149.

⁹⁷² Higgins, *Themes and Theories*, 485.

⁹⁷³ Article 2 of ECHR.

⁹⁷⁴ ECtHR, *Boso v. Italy*, App. No. 50490/99, Decision of 5 September 2002, para. 1 of “the Law”

⁹⁷⁵ “A rule or fact derogating from a more general, contrary rule or fact”, Aaron X. Fellmeth, Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009), 100. For terminological clarity, the term “derogating” was not used in a main text, as its meaning differs from that generally understood in this thesis.

⁹⁷⁶ This naturally implies that if pinpoint exceptions, *i.e.*, “explicit exceptions” exist, there must also be “implicit exceptions”, and this thesis embraces that view fully, accepting that “implicit exceptions” arise from the defeasibility of norms.

⁹⁷⁷ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 312.

⁹⁷⁸ Nickel, “Two Models of Normative Frameworks”, 65.

of a high severity for this privilege (of exception, A.Z.) to apply, but proportionality is required.⁹⁷⁹

The fact that this is not only true, but also an important distinction from limitations is confirmed by the Court's explicit statement that the term "absolutely necessary" imposes "a stricter and more compelling test of necessity" as opposed to that normally applicable when determining what is "necessary in a democratic society" within limitation clauses.⁹⁸⁰ So, the force used in interfering with the right to life must be "strictly proportionate" to the achievement of one of three aims set out in Article 2.⁹⁸¹

Once again, Trapp articulated this as if the ECHR exempts particular government conduct from the scope of the right, while the ICCPR and the ACHR do not contain similar provisions, but only exempt non-arbitrary deprivations of life.⁹⁸² The same goes for the ACHPR.⁹⁸³ So, it could be said that, at least from this perspective, non-arbitrary deaths do not engage with the right to life.⁹⁸⁴

Possible example of this type of restriction could also be Article 5 of the ECHR, which lays down the right to liberty and security of person.⁹⁸⁵ However, it also states that "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."⁹⁸⁶

In this regard, the ECtHR explained that "sub-paragraphs (a) to (f) of Article 5 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty" and that "no deprivation of liberty will be lawful unless it falls within one of those

⁹⁷⁹ *Ibid*, 64.

⁹⁸⁰ ECtHR, *McCann and Others v. UK*, para. 149.

⁹⁸¹ *Ibid*, para. 149

⁹⁸² Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 316. Both treaties specify that "no one shall be arbitrarily deprived of his life", see Article 4 of the ICCPR and Article 4 of the ACHR.

⁹⁸³ Article 5 of the African Charter.

⁹⁸⁴ Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 308.

⁹⁸⁵ Article 5, paragraph 1 of ECHR.

⁹⁸⁶ Article 5, paragraph 2 of ECHR.

grounds”.⁹⁸⁷ Also, “only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty”.⁹⁸⁸

So, three strands of reasoning were identified as running through the Court’s case-law regarding Article 5:

i) “the exhaustive nature of the exceptions, which must be interpreted strictly, and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular)”, meaning that this right cannot be restricted for the same aims as contained in limitation clauses,

ii) “the repeated emphasis on the lawfulness of the detention”, conveying the need to adhere to the rule of law and the significance of the principle of legality, and

iii) “the importance of the promptness or speediness of the requisite judicial controls”,⁹⁸⁹ probably implying the importance of the judicial review of interferences with the right, particularly the (strict) proportionality requirement.

This is in accordance with some doctrinal views. For Neuman, the right to liberty can be “limited only in six enumerated contexts, with specific features detailed for each context”, emphasizing that neither the ICCPR nor ACHR permit such precise limitations, but use a broadly formulated standard of arbitrariness to limit deprivations of liberty.⁹⁹⁰ They both state nearly the same, that no one shall be deprived of his (physical) liberty except on such grounds and in accordance with such procedure as established by law.

Thus, once more, counterparts of these provisions, both regarding the right to life and the right to liberty cannot be found in any other human rights treaty.

However, it must be noted that the HRC basically accepted pinpoint exceptions laid down in the ECHR as applicable to the ICCPR, by stating that examples of deprivation of liberty include “police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalisation, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported”, together with “certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices”, and “during a period of military service, restrictions that would amount to deprivation of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned”.⁹⁹¹

Unfortunately, it did not give much detail about the nature of these exceptions, nor conditions for their applications, so it can only be assumed that they would be modelled on those established by the ECtHR.

The HRC did clarify, though, that “the notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as

⁹⁸⁷ ECtHR, *Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment of 15 December 2016, para. 88.

⁹⁸⁸ *Ibid.*

⁹⁸⁹ ECtHR, *Buzadji v. Moldova*, App. No. 23755/07, Judgment of 5 July 2016, para. 84.

⁹⁹⁰ Neuman, “Constrained Derogation”, 19.

⁹⁹¹ HRC, *CCPR General Comment No. 35*, para. 5.

elements of reasonableness, necessity and proportionality”.⁹⁹² In those cases that allow it, detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁹⁹³ However, what can be reproached is that it did not explicitly explain what kind of proportionality is needed, that is, whether a more rigorous proportionality test should be conducted when it comes to this right, but that can be indirectly deduced from its insisting that every imprisonment “must be necessary”.⁹⁹⁴

Similarly, the IACtHR specified not only that the reason for the deprivation or restriction of the right to liberty must be embodied in the law, but also that this law and its application must be compatible with the Convention.⁹⁹⁵ Put differently, “to ensure that this measure is not arbitrary, it must respect the following requirements:

(i) that the purpose of the measures that deprive or restrict liberty is legitimate;

(ii) that the measures adopted are appropriate to achieve the intended objective;

(iii) that they are necessary, in the sense that they are absolutely essential to attain the desired objective, and that there is no measure that is less onerous in relation to the affected right, among all those that are similarly appropriate to achieve the proposed objective (for this reason, the Court has indicated that the right to personal liberty presupposes that any limitation must be exceptional);

(iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate compared with the advantages obtained by the use of this restriction and the achievement of the intended objective.”⁹⁹⁶

Accordingly, this Court has also explicitly required nearly the same conditions as the ECHR, with a particular emphasis on the strict proportionality test, evident from the words “absolutely essential”, thereby confirming that when it comes to this type of human rights restrictions, they still operate to some extent as principles, as they must be balanced against one of the specific legitimate aims, but this proportionality is much more stringent than with regard to limitations. The IACommHR has even explicitly referred to the ECtHR’s case-law when stated that legitimate use of public force requires, among other things, that it is both necessary and proportionate to the circumstances, meaning that it must be applied with moderation and in proportion with the legitimate aim being pursued, and with efforts to minimise harm and loss of life.⁹⁹⁷ The Commission also underlined that for the use of force by state agents to meet international standards, it must not go beyond what is “absolutely necessary”.⁹⁹⁸

Neuman followed this line of reasoning, arguing that these provisions should be understood as an effort to translate into legal terms suprapositive conceptions of how

⁹⁹² *Ibid*, para. 12.

⁹⁹³ *Ibid*, para. 18.

⁹⁹⁴ HRC, *Nystrom v. Australia*, Communication No. 1557/2007, CCPR/C/102/D/1557/2007, 1 September 2011, paras. 7.2. – 7.3.

⁹⁹⁵ IACtHR, *Yvon Neptune v. Haiti*, Judgment of 6 May 2008, para. 98.

⁹⁹⁶ *Ibid*.

⁹⁹⁷ IACommHR, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124 Doc. 5 rev.1, 7 March 2006, para. 65.

⁹⁹⁸ *Ibid*.

inherent human freedoms should be harmonised with communal life in a broader sense.⁹⁹⁹ This position was reinforced by an illustration of the ECtHR's willingness to adopt a highly creative approach in its interpretation, expanding the scope of these exceptions so much that they even contradicted its own prior rulings.

Namely, it was traditionally accepted that the "exhaustive list" in Article 5 did not allow for internment of preventive detention,¹⁰⁰⁰ which is why in cases of international armed conflicts, a derogation of this right was required for such detention to be considered lawful.¹⁰⁰¹ Thus, permitted restriction was insufficient to accommodate the needs of state in such situations, especially in cases involving the capture of prisoners of war or the detention of civilians posing a security risk under the Third and Fourth Geneva Conventions. However, over time, the Court revised its approach and permitted this type of detention during international armed conflict, as governed by international humanitarian law, stating that "the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5".¹⁰⁰² Furthermore, it added that "the Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15", but that "it can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers."¹⁰⁰³

This is an example of how the Court not only engages in balancing when determining whether to permit the application of these pinpoint exceptions but tries to do so with such precision that it is ready to adjust and adapt its rulings based on varying considerations and contexts, such as the difference between peacetime and armed conflict. For this reason, it is difficult to accept Trapp's assertion that, in the case of these restrictions, "the reasoning is algorithmic - the court can only apply or not apply the primary rule"¹⁰⁰⁴. The process is far from that, as the Court clearly considers a wide range of factors when determining whether the pinpoint exception should even be applied. Once it decides in favour of applying the exception, the reasoning indeed becomes algorithmic, as the primary rule is no longer applied. However, this is not a distinctive feature of this type of reasoning. The main issue with Trapp's stance is that it resembles too closely the nature of rules, which are either applied or not, potentially leading to a misleading conclusion, since, as already indicated, these provisions function as principles.

But it seems that she also realised that, when stating that the ECHR recognises a broad interest in liberty, but excludes specific deprivations of liberty from the scope of the right,

⁹⁹⁹ Neuman, "Constrained Derogation", 20.

¹⁰⁰⁰ ECtHR, *Hassan v. UK*, para. 97.

¹⁰⁰¹ ECtHR, *Al-Jedda v. UK*, App. No. 27021/08, Judgment of 7 July 2011, paras. 99–100, 110. Neuman referred also to Jelena Pejić, "The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law", *International Review of the Red Cross* 93, no. 864 (2011): 837.

¹⁰⁰² ECtHR, *Hassan v. UK*, 103.

¹⁰⁰³ *Ibid*, para. 104.

¹⁰⁰⁴ Trapp, "Exemptions, Qualifications, Derogations, and Excuses", 310.

allowing considerations such as security to be factored in when defining the scope of a right.¹⁰⁰⁵

Additionally, Trapp insightfully demonstrated how this right (or even this type of human rights restriction) is often misunderstood in practice, by analysing the reasoning and argumentation of the UK national organs, who asserted that “Article 5 is an absolute right”, while factoring in considerations such as the protection of public order when determining whether a violation of the right had occurred and stating that the aim of this approach was “so that competing fundamental rights might be reconciled with each other”.¹⁰⁰⁶ Undoubtedly, Article 5 can hardly be regarded as an absolute right – if for no other reason than the fact that it is a derogable right. Thus, this remains as a vivid example of how different human rights restrictions can be confused.

All the more so given that Trapp commented on the case *A and Others v. UK*, in which the ECtHR upheld the UK’s derogation following the 9/11 in the context of counterterrorism, implying that this was acceptable because the right to liberty is not a qualified right (in her terms; in the terms of this thesis, it would be appropriate to say that it does not contain a limitation clause). As a result, it cannot be limited for the protection of national security, making derogation the only available type of human rights restriction that can be used regarding this right for that purpose.¹⁰⁰⁷ Thus, it is difficult to accept the claim that “there is a not unreasonable argument to be made that national security, already a basis for limiting human rights in respect of certain qualified rights, should not be double counted as a derogation triggering situation”.¹⁰⁰⁸ As previously explained, although derogation and limitation share certain similarities, they are utterly different. While derogation is inherently tied to extraordinary situations, limitation is a feature of normal, everyday life context. Moreover, each requires distinct conditions to be lawfully applied. Even though, as already noted, limitation clauses may be useful even in times of crisis, such as during a pandemic, and states should strive to use derogation only as a last resort, this does not mean that rights containing limitation clauses should not be subject to derogation. If that were the case, some of the treaties would explicitly designate those rights as non-derogable, which they do not do. Ultimately, the fact that these are all separate and, to some extent, even unrelated types of human rights restrictions is evident in that some of the rights containing pinpoint exceptions remain derogable, while others do not.

Finally, another, although seldomly cited example of this type of restriction is Article 4, which prohibits slavery and forced labour, but specifies that “for the purpose of this Article the term ‘forced or compulsory labour’ shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

¹⁰⁰⁵ *Ibid*, 316.

¹⁰⁰⁶ *Ibid*, 312. See also ECtHR, *Austin v. UK*, App. No 39692/09, Judgment of 15 March 2012, para. 37, where the argumentation is fully presented and cited.

¹⁰⁰⁷ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 315.

¹⁰⁰⁸ *Ibid*, referring also to Ed Bates, “A ‘Public Emergency Threatening the Life of the Nation’? The United Kingdom’s Derogation from the European Convention on Human Rights of 18 December and the ‘A’ Case,” *British Yearbook of International Law* 76 (2006): 251.

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.”¹⁰⁰⁹

The ECtHR did not provide much of a theoretical explication of the nature of paragraph 3 of Article 4, but stated that “it is not intended to ‘limit’ the exercise of the right guaranteed by paragraph 2, but to ‘delimit’ the very content of this right”, indicating “what the term forced and compulsory labour shall not include”.¹⁰¹⁰ It further clarified that it serves as an aid to the interpretation of paragraph 2, and additionally stated that “the four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs”.¹⁰¹¹ The Court also used the phrases such as “Article 4, paragraph 3 excludes from the scope of ‘forced or compulsory labour’”¹⁰¹² or “Article 4 paragraph 3 indicates that the term ‘forced or compulsory’ labour does not include” and then went on to state one of the pinpoint exceptions.¹⁰¹³

Unlike previous examples, this provision is almost identically contained in both ICCPR and ACHR, but not in the ACHPR.¹⁰¹⁴ Third paragraph of ICCPR’s Article 8 prohibits requiring the performance of forced or compulsory labour, but specifies that it shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court, and defines what the term “forced and compulsory labour” shall not include, almost identically as the ECHR. This holds true also for Article 6 of the ACHR, but with the addition that “forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner”.

Therefore, considering that the purpose of pinpoint exceptions is to exclude certain precisely defined situations from the scope of the right, this thesis suggests that these examples should likewise be regarded as pinpoint exceptions.

¹⁰⁰⁹ Article 4 of the ECHR.

¹⁰¹⁰ ECtHR, *Van der Mussele v. Belgium*, App, No, 8919/80, Judgment of 23 November 1983, para. 38. Interestingly, Nickel reproached that there is no expressly mentioned proportionality requirement or reparation for individuals with regard to both Article 4, paragraph 3 and Article 5 of the ECHR, see Nickel, “Two Models of Normative Frameworks”, 64-65.

¹⁰¹¹ ECtHR, *Van der Mussele v. Belgium*, para. 38. See also ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, 2018, para. 33.

¹⁰¹² ECtHR, *Bayatyan v. Armenia*, App. No. 23459/03, Judgment of 7 July 2011, para. 100.

¹⁰¹³ ECtHR, *Stummer v. Austria*, para. 119.

¹⁰¹⁴ Article 5 of the African Charter just states that “all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.”

III FINDING ABSOLUTE HUMAN RIGHTS IN THE NORMATIVE FRAMEWORK AND CASE LAW OF THE INTERNATIONAL COURTS AND QUASI-JUDICIAL BODIES

This chapter offers a comparative analysis of the approaches taken by the monitoring bodies of the European Convention on Human Rights, the International Covenant on Civil and Political Rights (hereby: ICCPR), and the American Convention on Human Rights (hereby: ACHR) to the notion of absolute rights, with the particular focus on how legal scholars have engaged with this concept in their interpretation of the judicial practice.

The chapter considers, for instance, reactions from the doctrine to the specific rights designated as non-derogable under these instruments, and whether the qualification of certain rights as “absolute” finds coherent support in the theory. Aiming to clarify whether the category of absolute rights remains conceptually and normatively robust in contemporary human rights law, or whether it continues to generate more questions than answers, the chapter attempts to shed light on how international human rights law bodies, that are responsible for their application, understand and apply the concept of absolute rights in practice, and whether their approach aligns with or departs from the textual boundaries established by the treaties themselves. Special attention is dedicated to investigating whether they have offered any kind of definition of absolute rights, whether such a definition could be inferred from the case-law and whether any consistency can be identified in the qualification of rights as absolute.

The structure of the chapter follows the thematic scheme, as it is a detailed analysis of each right that, according to the relevant derogation clauses, cannot be suspended even in times of emergency. By closely examining the interpretation of these clauses by the treaty monitoring bodies, the chapter explores how these institutions engage with the idea of absolute human rights.

The section goes beyond examining only those rights that are explicitly classified as non-derogable, hence it also includes an analysis on rights that, while not formally listed as non-derogable, may have nonetheless been regarded in practice as unconditional and absolute. This is especially important, as it may also reveal how the treaty organs reasoned about such rights in their case-law, and whether their practice reflects a deeper normative commitment to treating certain rights as absolute.

1. The Right to Life

*“Any man's death diminishes me, because I am involved in mankind,
and therefore never send to know for whom the bells tolls; it tolls for thee.”*

– John Donne (*Devotions Upon Emergent Occasions*, 1624)

The right to life has been traditionally perceived as the most fundamental right,¹⁰¹⁵ without the protection of which other rights cannot be realised,¹⁰¹⁶ as they are contingent upon the existence of life,¹⁰¹⁷ and even a *jus cogens* norm of international law.¹⁰¹⁸

Relying on its non-derogable character in various international human rights treaties, some scholars concluded that it is an absolute right,¹⁰¹⁹ as well as an integral part of the irreducible core of human rights¹⁰²⁰. Cornelis Kees Wouters has also explicitly classified it, particularly Article 2 of the ECHR and Article 6 of the ICCPR, as an absolute right, noting that those are rights that are framed in absolute terms, allow no exceptions for reasons of public interest or national security, and cannot be derogated from even in times of war or public emergencies.¹⁰²¹

However, there are also those who deny its absolute nature, pointing out that in certain situations taking of life is permitted – such as the death penalty, the use of lethal force by state security officials, or during armed conflict.¹⁰²² Christian Tomuschat questioned the classification of the right to life as a peremptory norm in its entirety, arguing that it is never guaranteed in an absolute sense but is instead subject to restrictions established by law.¹⁰²³ Serhiy Melenko and Dan Paranyuk explicitly listed the right to life among relative and not absolute rights, due to its axiological “fillings”, cases in which deprivation of life would not be contrary to the ECHR.¹⁰²⁴

Owing to this dispute, combined with the inherent problems in defining its scope at the peripheries (the beginning and the end of life), Smith had a valid point in describing the right to life as one of the more controversial human rights.¹⁰²⁵

There is, thus, an inherent inconsistency that arises from the dilemma of how a right that is, by definition, restricted by pinpoint exceptions, can be considered absolute. Moreover, given the layered nature of its content, which encompasses both a negative obligation of the

¹⁰¹⁵ Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford: Oxford University Press, 2010), v.

¹⁰¹⁶ *Ibid.* See also Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 128.

¹⁰¹⁷ See for instance Blackstone’s account of the right to life as an absolute right analysed in Bedau, “The Right to Life”, 550-575.

¹⁰¹⁸ Karen Parker and Lyn Beth Neylon, “Jus Cogens: Compelling the Law of Human Rights”, *Hastings International and Comparative Law Review* 12, No. 2 (1989): 431.

¹⁰¹⁹ Tanasije Marinković, Ivana Krstić, *Evropsko pravo ljudskih prava* (Beograd: Savet Evrope, 2016), 129; Yutaka Arai-Yokoi, “Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR”, *Netherlands Quarterly of Human Rights* 21, No. 3 (2003): 401.

¹⁰²⁰ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, Dissenting Opinion of Judge Weeramantry, 52.

¹⁰²¹ Cornelis Kees Wouters, “International refugee and human rights law: partners in ensuring international protection and asylum”, in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 234-235.

¹⁰²² See for instance Smith, “The Right to Life”, 223; Dragoljub Popović, Violeta Beširević, Slavoljub Carić, Marija Draškić et al, *Komentar Konvencije za zaštite ljudskih prava i osnovnih sloboda* (Beograd: Službeni glasnik, 2017), 48.

¹⁰²³ Christian Tomuschat, “The Right to Life – Legal and Political Foundations”, in *The Right to Life*, eds. Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (Leiden: Martinus Nijhoff, 2010), 5-6.

¹⁰²⁴ Serhiy Melenko and Dan Paranyuk, “The Issue of Correlation between Absolute and Relative Human Rights: Logical-Gnosiological Analysis”, *European Journal of Law and Public Administration* 5, no. 1 (2018): 39-41.

¹⁰²⁵ Smith, “The Right to Life”, 217.

state to refrain from taking life and a positive obligation to take all reasonable measures to protect the lives of individuals within its jurisdiction, not only from harm caused by the state and its agents, but also from threats posed by private actors,¹⁰²⁶ it is evident that it does not guarantee the inviolability of life in all circumstances. What is more, states are usually required to take appropriate measures to address the broader societal conditions that threaten life or undermine the right to life with dignity, including ensuring access without delay to essential goods and services such as food, water, shelter, healthcare, electricity and sanitation, as well as by strengthening services such as emergency response, healthcare and social housing.¹⁰²⁷ Additional important traits of the right to life are the duties of states to investigate and prosecute those responsible for unlawful deprivations of life,¹⁰²⁸ and to refrain from deporting, extraditing or otherwise transferring individuals to countries where substantial grounds exist for believing that there is a real risk of violating their right to life.¹⁰²⁹

Paris Minimum Standards insisted that “Every person has the inherent right to life”, that “This right shall be protected by law” and that “No one shall be arbitrarily deprived of his right to life”¹⁰³⁰. Also, “every state shall remain fully accountable for every enforced or involuntary disappearance of an individual within its jurisdiction occasioned by an act or omission of the state”.¹⁰³¹ In order to “prevent inhuman and criminal practice of disappearances which may lead to illegal or arbitrary deprivation of the right to life, every state shall:

(a) maintain central registers or records to account for all persons that have been detained, so that their relatives and other interested persons may promptly learn of any arrests that may have been made;

(b) guarantee that such detention shall be made only by competent and duly identified authorities as may be prescribed by law or regulations;

(c) guarantee that the persons so detained shall be kept in premises which afford every possible safeguard as regards hygiene and health”.¹⁰³²

Evidently, the document accords particular weight to the issue of forced disappearance, recognizing it as a grave human rights violation requiring prompt and effective measures of prevention, investigation, and accountability.

Concerning human rights treaties, the right to life is guaranteed by the Article 2 of the ECHR, which states in its first paragraph that:

¹⁰²⁶ Marinković, Krstić, *Evropsko pravo ljudskih prava*, 128. It is also said that all human rights give rise to positive and negative obligations, see Mari Stenlund, Pamela Slotte, “Forum Internum Revisited: Considering the Absolute Core of Freedom of Belief and Opinion in Terms of Negative Liberty, Authenticity, and Capability”, *Human Rights Review* 19 (2018): 438.

¹⁰²⁷ HRC, *CCPR General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, Article 6: Right to Life*, CCPR/C/GC/36, 3 September 2019, para. 26.

¹⁰²⁸ *Ibid.*, paras. 27–28; ECtHR, *Skendžić and Krznarić v. Croatia*, App. No. 16212/08, Judgment of 20 January 2011, para. 77.

¹⁰²⁹ HRC, *CCPR General Comment No. 36*, para. 30; Marinković, Krstić, *Evropsko pravo ljudskih prava*, 129.

¹⁰³⁰ Lillich, *The Paris Minimum Standards*, 1076.

¹⁰³¹ *Ibid.*

¹⁰³² *Ibid.*

“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.”

As already stated, according to the Article 15 of the ECHR, the right to life is a non-derogable one.

ECtHR has consistently reiterated that both Article 2 and Article 3 of the ECHR are “amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe”,¹⁰³³ while the European Commission held that “the interpretation of Article 2 must be guided by a recognition that it constitutes one of the most important rights in the Convention, from which no derogation is permissible, even in times of public emergency”¹⁰³⁴.

Unlike with some other articles of the ECHR, the Court does not consistently invoke the “argument of absoluteness” when it comes to the right to life. Nevertheless, there are few examples. While dealing with the matter of deportation and procedural requirements of Articles 2 and 3 of the ECHR, the Court held that an asylum-seeker is nominally required to disclose a specific individual ground for asylum, in order to persuade the state to grant the protection,¹⁰³⁵ but “considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion”¹⁰³⁶. Few paragraphs later, it recapitulated the same stance by claiming that “having regard to the absolute nature of Articles 2 and 3 of the Convention, though, it is hardly conceivable that the individual concerned could forego the protection afforded thereunder”, hence “it follows therefore that, regardless of the applicant’s conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal”.¹⁰³⁷ Therefore, it seems as if the Court invoked the absolute nature of the right as an argument needed to justify its departure from the established norms governing the burden of proof in asylum cases and its prior case-law. In other words, to do so, it decided to frame the right in question as exceptionally important and it did that by qualifying it as an absolute right, without truly embarking on the question what the absoluteness of the right means, but by relying on its intuitive meaning. To add to the conundrum, the Court’s reasoning is in a way circular, as it loops back on itself, being completely unconvincing. If disjoined in a more basic premises, the reasoning would go as follows:

- (i) The right is absolute because it very important.
- (ii) The reason why the right is so important is because it is absolute.

¹⁰³³ ECtHR, *McCann and Others v. UK*, App. No. 18984/91, Judgment of 27 September 1995, para. 147; ECtHR, *Šilih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009, para. 147.

¹⁰³⁴ ECtHR, *Stewart v. UK*, App. No. 10044/82, Decision of 10 July 1984, 162.

¹⁰³⁵ The term “prove” is deliberately not used here, as the burden of proof is applied in a rather specific manner in the asylum cases, for more see UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

¹⁰³⁶ ECtHR, *F.G. v. Sweden*, App. No. 43611/11, Judgment of 23 March 2016, para. 127.

¹⁰³⁷ *Ibid*, para. 156.

Put differently, it appears as if, the Court said that, due to right's absoluteness and following importance, it is justified to depart from the usual norms or case-law:

- (i) The right should be treated differently because it is absolute.
- (ii) The right is absolute because it is treated differently.

Hence, instead of providing independent reasons for the departure, or explanation of the right's absoluteness, the Court fell into a trap of circular reasoning (*petitio principii*) and failed to act upon a possibility to provide some, at least doctrinal, clarifications.

At least one other example may be found where the "argument of absoluteness" is similarly employed to justify departures from Court's earlier positions. For instance, while considering whether a claim is necessary for the Court to award damages to the applicant, it recalled that in the past it "found it necessary, in rare cases, to make a monetary award in respect of non-pecuniary damage, even where no such claim had been made or where the claim was belated, taking into account the exceptional circumstances of the cases, for instance the absolute or fundamental character of the right or freedom violated".¹⁰³⁸ However, dissenting voices of Judges Raimondi, O'Leary and Ranzoni underlined that "in the small number of cases where the Court has granted an award in the absence of a duly made claim, it has, more often than not, justified its departure from the Rules of Court with reference to the absolute character of the article of the Convention violated or to the fundamental importance of the right at stake".¹⁰³⁹ Yet, they were concerned that "in some other cases, no such justification for the award is provided, the latter being simply tied to the particular circumstances of the case" and that "the breadth of the Grand Chamber's language reveals the worrying aspect – namely, how difficult it will be for the Court to limit the parameters of its own judicially-created exception", even pointing to the possibility of "the exception becoming so broad that it will further consume the rule from which it was intended to only exceptionally deviate".¹⁰⁴⁰ And the dissenting judges likely had a point, if nothing else, then because they recognised the danger of relying on circular reasoning and avoiding the need to offer systematic and convincing arguments in a logically coherent way, instead of hiding behind the spine-chilling language, such as "absolute right".

On the other hand, in deliberating a controversial question of the right to life of a foetus, the Court dealt with a case involving a woman who planned to carry her pregnancy to term, with the unborn child expected to be viable, but due to a medical error, the pregnancy had to be terminated through a therapeutic abortion.¹⁰⁴¹ The Court recalled the stance of the Commission that "the 'life' of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman", hence "if Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman", which would mean that "the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman".¹⁰⁴² Moreover, the Commission was confident that this reflected a consensus among Member States, as they virtually all permit abortion when necessary to save the life of the mother, with a clear

¹⁰³⁸ ECtHR, *Nagmetov v. Russia*, App. No. 35589/08, Judgment of 30 March 2017, para. 69.

¹⁰³⁹ ECtHR, *Nagmetov v. Russia*, Joint Dissenting Opinion of Judges Raimondi, O'Leary and Ranzoni, para. 41.

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ ECtHR, *Vo v. France*, App. No. 53924/00, Judgment of 8 July 2004, para. 81.

¹⁰⁴² *Ibid.*, para. 77.

tendency towards further liberalisation.¹⁰⁴³ It concluded that even if the Article 2 was applicable in the instant case there has been no violation of the right to life.¹⁰⁴⁴

So, what the Court said here could be understood in plain language as follows: if the right to life is absolute, and if it extends to the foetus, then abortion would necessarily have to be prohibited. As it happens that the abortus is not completely prohibited in almost all Member States, and assuming the right to life is indeed absolute, it follows that the foetus is not protected under this right. Finally, even if the right to life is not absolute and if it does apply to the foetus, then it would need to be balanced against the right of mother – and the right of mother must prevail, given that the abortion is not prohibited.

Once again, the Court not only missed the opportunity to take clear stance on the meaning of absoluteness, but also conveyed an impression of uncertainty as to whether it considers the right to be absolute or not, since it appeared to allow for both possibilities while ultimately reaching the same conclusion. At best, the Court uses the argument of absoluteness to reinforce conclusions it had already reached, rather than engaging with it in any substantive way.

The separate opinion of Judge Costa, joined by Judge Traja opposed this line of the Court's reasoning, noting that many European constitutional courts have acknowledged that the right to life under Article 2 applies to the embryo or the foetus.¹⁰⁴⁵ They argued that the question of whether the right is absolute is a distinct issue and that it is even possible for the right to apply in such cases without necessarily being absolute.¹⁰⁴⁶ It was even stated that it might be considered "preposterous for the Court to find that Article 2 is not absolute", given its non-derogable character, or that it is subject to implied exceptions other than those exhaustively set out in the provision itself, since the unborn child is not among those exceptions.¹⁰⁴⁷ Nevertheless, it was concluded that the Court should have applied Article 2, as there is life before birth, which should be protected and that "if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of derogation".¹⁰⁴⁸

Despite criticisms that can be directed at the Court's reasoning in this judgment, the excerpts quoted from the separate opinion indicate some confusion regarding the concept of derogation, which is, at least in the terminology of the ECHR, linked to a state of emergency. It is unclear how a state could invoke it under normal circumstances in order to allow voluntary termination of pregnancy, given that the Convention does not allow for such a possibility among pinpoint exceptions. Nor is it clear how the right could apply to a foetus, abortion remain permitted, and the right still be considered absolute.

Various other separate opinions mention the term "absolute right" in relation to Article 2 of the ECHR. For instance, in one recent case regarding death resulting from alleged medical negligence, Judge Pinto de Albuquerque stated that "interferences with the right to life are submitted to a stringent proportionality test ('absolutely necessary') and

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ *Ibid.*, para. 95.

¹⁰⁴⁵ ECtHR, *Vo v. France*, Separate Opinion of Judge Costa, Joined by Judge Traja, para. 12.

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ *Ibid.*, para. 14.

¹⁰⁴⁸ *Ibid.*, para. 17.

furthermore to an *absolute*, non-derogable norm, which presupposes respect for an inviolable core that transcends the circumstances of each specific case”.¹⁰⁴⁹ He went on to elaborate that “neither war nor any other situation of public danger, neither cultural tradition nor religious diversity, limits the enforceability of the right’s core, since it gives rise to an irreducible, fundamental entitlement in the absence of which the right loses its value”, as well as that “a case-specific core would not be conducive to implementation by the courts, in view of its indeterminacy”, which “does not mean that the right’s core is an unduly rigid, context-independent, immutable value-based entity”, but the definition of the core “may evolve in the light of better information and scientific developments”.¹⁰⁵⁰ For him, the rights to life and physical integrity impose core obligations to safeguard the life and health of any person under the jurisdiction of the state at hand.¹⁰⁵¹

Yet this reasoning presents several conceptual tensions. While he asserted that the right to life is absolute, with “an inviolable core”, he simultaneously allowed for the possibility of this core evolving “in light of better information and scientific developments”. Such flexibility and adaptability actually may actually undermine the very idea of absoluteness, which appears to require uniform application, regardless of evolving societal or scientific understandings. Even more strikingly, the rhetoric of absoluteness is invoked immediately after the reference to exceptions and proportionality, which may suggest that the underlying approach relies on principles, which are fundamentally incompatible with the notion of absolute rights.

To further underline how the notion of absolute rights is often being used inconsistently and without a clear uniform meaning, an example can be found in one of the cases concerning the extraterritorial jurisdiction of the ECHR Member States, where Judge Bonello even introduced a peculiar category of a “near-absolute” right, stating that he “considered the doctrine of functional jurisdiction to be so linear and compelling that I would be unwilling to acquiesce to any exceptions, even more so in the realm of the near-absolute rights to life and to freedom from torture and degrading or inhuman treatment or punishment”, criticizing the Court for allowing even “very limited exceptions to the way in which Article 2 and 3 are applied in extreme cases of clear and present threats to national security”, as he would not “personally, subscribe to any exceptions at all” when it comes to these rights.¹⁰⁵²

However, the Court was also explicit in that “Article 2 cannot be interpreted as guaranteeing to every individual an absolute level of security in any activity in which the right to life may be at stake”¹⁰⁵³.

This evidently stems from the second paragraph of the Article 2, which provides that the deprivation of life resulting from the use of force – which is absolutely necessary to achieve one of the listed legitimate aims – shall not be regarded as a violation of this Article and which was categorised by this thesis as a pinpoint exception. To avoid confusion, the Court underlined that these exceptions do not refer to situations where the intentional killing is

¹⁰⁴⁹ ECtHR, *Lopes de Sousa Fernandes v. Portugal*, App. No. 56080/13, Judgment of 19 December 2017, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para. 65.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *Ibid.*, para. 66.

¹⁰⁵² ECtHR, *Al-Skeini and Others v. UK*, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello, para. 21.

¹⁰⁵³ ECtHR, *Molie v. Romania*, App. No. 13754/02, Decision of 1 September 2009, para. 44; ECtHR, *Gökdemir v. Turkey* App. No. 66309/09, Decision of 19 May 2015, para. 17.

permitted, but rather to cases where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life.¹⁰⁵⁴ What is more, as already explained in the previous chapter, the use of force must be “absolutely necessary”, which suggests that a stricter and more compelling test of necessity must be applied than the one normally used to determine whether State action is “necessary in a democratic society” under Articles 8 to 11 of the Convention, hence, the force used must be strictly proportionate to the achievement of the prescribed aims.¹⁰⁵⁵ Therefore, the ECtHR clearly applies a proportionality test in the context of the right to life. While this test is said to be stricter, it still involves balancing the right to life against legitimate aims and no matter how rigorous, proportionality is irreconcilable with absolute rights, as a truly absolute right cannot be weighed against any other right or interest without forfeiting its absolute character.¹⁰⁵⁶

Therefore, ECtHR’s interpretations of Article 2 demonstrate that the right to life is not considered absolute, given the specified pinpoint exceptions and the emphasis on the proportionality test.

When it comes to the ICCPR, Article 6, paragraph 1 lays down that:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

Non-derogability of this right is envisaged by Article 4, paragraph 2 of the ICCPR. The HRC was rather expressive in describing this right, by stating that it is “the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation”, that it has “crucial importance both for individuals and for society as a whole”, being “most precious for its own sake as a right that inheres in every human being”, while also constituting “a fundamental right”, “the effective protection of which is the prerequisite for the enjoyment of all other human rights”.¹⁰⁵⁷ Furthermore, it underlined that the right to life must not be interpreted narrowly, adding that it concerns the entitlement of individuals to be free from acts and omissions intended or likely to cause their unnatural or premature death, as well as to enjoy a life with dignity.¹⁰⁵⁸

Moreover, the HRC even stated that “the proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant” and offered as an example both Articles 6 and 7.¹⁰⁵⁹

However, the HRC has recently explicitly stated that “the right to life is not absolute”, explaining that “while the Covenant does not enumerate the permissible grounds for deprivation of life, by requiring that deprivations of life must not be arbitrary, (it) implicitly recognises that some deprivations of life may be non-arbitrary”, such as the use of lethal

¹⁰⁵⁴ ECtHR, *Giuliani and Gaggio v. Italy*, App. No. 23458/02, Judgment of 24 March 2011, para. 175.

¹⁰⁵⁵ ECtHR, *Ergi v. Turkey*, App. No. 66/1997/850/1057, Judgment of 28 July 1998, para. 79.

¹⁰⁵⁶ Ana Zdravković, „Pravo na život sagledano kroz prizmu apsolutnih ljudskih prava”, *Pravni život* 12 (2019): 347.

¹⁰⁵⁷ HRC, *CCPR General Comment No. 36*, para. 2. Similar stances can be found also in previous general comments, namely HRC, *CCPR General Comment No. 6: The Right to Life (Article 6)*, 30 April 1982, para. 1; HRC, *CCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, 9 November 1984, para. 1.

¹⁰⁵⁸ *Ibid*, para. 3.

¹⁰⁵⁹ HRC, *CCPR General Comment No. 29*, para. 11.

force in self-defence or death penalty in states that has yet not abolished it, but they must all also be applied in non-arbitrary manner.¹⁰⁶⁰

It is evident that the HRC did not clearly distinguish between non-derogability, absolute rights and *jus cogens* norms. Although these categories may be related, they are almost certainly conceptually distinct and conflating them can lead to doctrinal confusion. Consequently, it remains unsettled how the HRC can state that the right to life is “not absolute” while at the same time suggesting that it holds a peremptory status. Moreover, it is ambiguous how the right can be considered a peremptory norm when the HRC acknowledged the existence of permissible, non-arbitrary deprivations of life, such as in self-defence or through the death penalty, which implies conditionality and context-dependence, features incompatible with the peremptory status. Accordingly, even though it probably sought to clarify and explain certain issues, the Committee left even more questions open in this attempt than existed prior to the issuance of these General Comments.

As for the use of lethal force by state officials in the enforcement of law is an extreme measure and should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat, it cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.¹⁰⁶¹ On this point, it may seem as if the HRC has gone further in protecting the right to life than the ECHR, whose Article 2 provides that deprivation of life resulting from the use of force that is absolutely necessary to effect a lawful arrest or to prevent the escape of a person lawfully detained shall not be regarded as contrary to the Article. Nonetheless, the ECtHR has, in its case law, narrowed this exception by requiring that the person whose arrest is being attempted or whose escape is being prevented must pose a danger to life or limb, taking into account whether the alleged offence involves elements of violence.¹⁰⁶² This restrictive interpretation of the Convention’s text leads to the conclusion that both the European Court and the Committee agree that the state must be capable of employing other, less harmful measures to prevent escape, or, if escape occurs, must seek alternative means of resolving the situation, rather than resorting to lethal force, which is an extreme measure.¹⁰⁶³

In any case, according to the Committee, intentional deprivation of life can be exceptionally permitted only when it is strictly necessary to protect life from an imminent threat,¹⁰⁶⁴ hence it has also adopted the approach of balancing the exceptional situations against the right, thereby further confirming its position that the right is not absolute.

Finally, when it comes to the Inter-American system, the right to life is laid down in the Article 4 of ACHR, which in paragraph 1 provides that:

“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”.

Notably similar to the ICCPR, this provision has one specificity that cannot be found in any other – determining that the formal beginning of life, at least nominally, is from the

¹⁰⁶⁰ HRC, *CCPR General Comment No. 36*, para. 10.

¹⁰⁶¹ *Ibid*, para. 12.

¹⁰⁶² ECtHR, *Nachova and Others v. Bulgaria*, App. Nos. 43577/98, 43579/98, Judgment of 6 July 2005, para. 107.

¹⁰⁶³ Same conclusion can be found in Zdravković, „Pravo na život”, 343.

¹⁰⁶⁴ HRC, *CCPR General Comment No. 36*, para. 12.

moment of conception. This was relevant in the case-law of the treaty's monitoring organs, such as when the IACtHR addressed the ban on *in vitro* fertilisation (IVF) imposed in Costa Rica.¹⁰⁶⁵ Interestingly, domestic courts interpreted Article 4 as establishing absolute protection of the right to life, using this approach to justify the prohibition of IVF.¹⁰⁶⁶ The Court resorted to both historical and systematic interpretation of universal and regional human right treaty regimes in order to conclude that none of the systems considered embryo to be a person, and that "conception" in the sense of Article 4 occurs "at the moment when it becomes implanted in the uterus, which explains why, before this event, Article 4 would not be applicable".¹⁰⁶⁷ As follows, it can be concluded from "the words 'in general' that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible".¹⁰⁶⁸

The Court emphasised that "it is not admissible that the State argue that its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right absolute prevalence", but to the contrary, "this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defence of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty".¹⁰⁶⁹ In other words, "in application of the principle of the most favourable interpretation, the alleged 'broadest protection' in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognised in the Convention or limit them to a greater extent that the Convention establishes".¹⁰⁷⁰ Further, the Court explicitly referred to the need to find "an adequate balance between possible competing rights",¹⁰⁷¹ thereby denying the right to life an absolute status, for the very reason of its potential capacity to limit other rights, leading the Court to conclude that a balancing exercise must be part of this right's interpretation. Put simply, the Court strongly insisted on balancing competing rights, which prevents absolutisation of one right at the expense of others, with the aim of avoiding disproportionate restrictions.

The right to life cannot be derogated according to the second paragraph of Article 27 of the ACHR and the Court has found that "when the right to life is not respected, all of the other rights lack meaning" and that the states "have the obligation to ensure that conditions are created as necessary to ensure that violations of this inalienable right not occur, and, in particular, the duty to impede its agents from attacking it".¹⁰⁷² It is "a fundamental and basic

¹⁰⁶⁵ IACtHR, *Artavia Murillo and others ("In Vitro Fertilization") v. Costa Rica*, Judgment from 28 November 2012.

¹⁰⁶⁶ Silvia Serrano Guzmán, "The Transformative Impact of the *Artavia Murillo* Case in In Vitro Fertilization", in *The Impact of the Inter-American Human Rights System*, eds. Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi (Oxford University Press, 2024), 287.

¹⁰⁶⁷ IACtHR, *Artavia Murillo and others ("In Vitro Fertilization") v. Costa Rica*, para. 264.

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ *Ibid.*, para. 259.

¹⁰⁷⁰ *Ibid.*, para. 259.

¹⁰⁷¹ *Ibid.*, para. 260.

¹⁰⁷² See for instance IACtHR, *Case of Children's Rehabilitation v. Paraguay*, Judgment of 2 September 2004, para. 156.

right for the exercise of any other right”¹⁰⁷³. The Commission went as far as to even assert that the right to life as a peremptory norm constitutes the essential basis of the exercise of the other rights,¹⁰⁷⁴ proclaiming it to be part of *jus cogens* norms.

Some scholars have also interpreted the Inter-American system as recognizing that the right to life encompasses more than protection against arbitrary deprivations by state, but also includes the right to a dignified or decent existence.¹⁰⁷⁵

Worth mentioning is also the separate opinion of Judge Trindade who argued that “the absolute prohibition of grave violations of fundamental human rights – starting with the fundamental right to life” is part not only of the treaty, but also of contemporary customary international law, and encompass “obligations *erga omnes*, owed to the international community as a whole”.¹⁰⁷⁶ He went so far as to argue that this marks a shift away from the traditional positivist-voluntarist conception of international law and signals the emergence of a new legal order grounded in “superior common values” and “moral and juridical imperatives”, particularly the protection of human beings in all situations, whether in peace or war.¹⁰⁷⁷ It can be said that the opinion offered a more philosophically and normatively ambitious view, aiming to push the jurisprudence further toward a human-centred rather than state-oriented international law.

Finally, one of the ways the IACtHR has remarkably influenced the development of human rights law is through its approach to forced disappearance, which involves the violation of multiple rights, including the right to life.¹⁰⁷⁸ It is defined as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.¹⁰⁷⁹ The Court admitted significant gravity to the fact that it is a non-derogable right, assessing that “the rights to life and to humane treatment are central to the Convention. According to Article 27(2) of the said treaty, these rights form part of the non-derogable nucleus, because they are established as rights that cannot be suspended in case of war, public danger or other threats to the independence or security of the States Parties”.¹⁰⁸⁰

¹⁰⁷³ IACommHR, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, 7 March 2006, para. 42.

¹⁰⁷⁴ IACtHR, *Niños de la Calle v. Guatemala*, Judgment of 19 November 1999, para. 139.

¹⁰⁷⁵ Jo M. Pasqualucci, “The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System”, *UC Law SF International Law Review* 31, No. 1 (2008): 31.

¹⁰⁷⁶ IACtHR, *Las Palmeras v. Colombia*, Judgment of 4 February 2000, Separate Opinion of Judge Antonio Augusto Cançado Trindade, para. 15.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ Nikolas Kyriacou, “An affront to the conscience of humanity: enforced disappearances in the case-law of the Inter-American Court of Human Rights”, *Inter-American and European Human Rights Journal* 18 (2014): 17-38.

¹⁰⁷⁹ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 2.

¹⁰⁸⁰ IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006, para. 119.

The UN International Convention for the Protection of All Persons from Enforced Disappearance stipulates that “No one shall be subjected to enforced disappearance”, a formulation that led the UN Secretary-General to conclude on the absolute nature of the prohibition, explaining that the treaty “affirms unequivocally that the use of enforced disappearance is illegal under any circumstances, including war, internal political instability or any other public emergency”.¹⁰⁸¹

It was also asserted that within the Inter-American system “the general clause of protecting the individual from the arbitrary deprivation of life, which entails an absolute prohibition on arbitrary executions and forced disappearances, interpreted in keeping with the obligation to respect and ensure human rights, gives rise to both negative and positive obligations incumbent on the states”.¹⁰⁸²

Moreover, the IACtHR went so far as to conclude that due to particular gravity of the offenses and the nature of the rights harmed, “the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*”¹⁰⁸³. It is also curious how the Court appears to use the terms *jus cogens* and non-derogable rights almost interchangeably, stating that “the torture and forced disappearance of the alleged victims, the prohibition of which is a non-derogable provision of international law or *jus cogens*”¹⁰⁸⁴, and further elaborating that “the facts of this case have violated non-derogable provisions of international law (*jus cogens*)”¹⁰⁸⁵. The Court went on to describe these acts as being “among the conducts deemed to harm essential values and rights of the international community and [which] entail the activation of national and international measures, instruments and mechanisms to ensure their effective prosecution and the sanction”¹⁰⁸⁶.

The significant importance that is given to the non-derogability of right in the Inter-American system is evident also from the separate opinion of Judge Trinidad, declaring that “the definition of crimes against humanity is a major contemporary victory, encompassing, in my opinion, not only international human rights law but also international criminal law, by reflecting the universal condemnation of grave and systematic violations of fundamental and non-derogable rights; in other words, violations of *jus cogens*”.¹⁰⁸⁷

As a result, the Court appears to conflate *jus cogens* norms with non-derogable rights, using the terms as if they are synonyms. This interpretive sloppiness mirrors a similar

¹⁰⁸¹ UN, “Amid Growing Use of Enforced Disappearances by Non-State Actors, Secretary-General Urges Prompt Action in Message on International Day Commemorating Victims”, Press Release SG/SM/17038-OBV/1508, 28 August 2015, available at <https://press.un.org/en/2015/sgsm17038.doc.htm> (accessed 28.3.2025)

¹⁰⁸² IACommHR, *Report on the situation of human rights defenders in the Americas*, para. 45. This is stated in the report with reference to various case-law of the Court, even though cited judgments do not contain the word “absolute”.

¹⁰⁸³ IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para. 84.

¹⁰⁸⁴ *Ibid*, para. 93.

¹⁰⁸⁵ *Ibid*, para. 128.

¹⁰⁸⁶ *Ibid*, para. 128. Moreover, the Court took a stance that “when the disappearance forms part of a systematic pattern or practice applied or tolerated by the State”, “it is a crime against humanity involving a gross rejection of the essential principles on which the inter-American system is based”, para. 82.

¹⁰⁸⁷ IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, Separate Opinion of Judge Antonio Augusto Cançado Trindade, para. 41.

conceptual ambiguity found in the HRC's approach to the right to life, where the Committee asserted that certain non-derogable rights reflect *jus cogens* status, yet simultaneously conceded that the right to life is "not absolute". Quite similarly, the Inter-American human rights bodies explicitly denied the absoluteness of the right to life, but given its non-derogability and the tendency to treat non-derogability and *jus cogens* status as equivalent, it could be said that they reached a conclusion resembling that of the HRC - that the right is not absolute, yet nonetheless qualifies as *jus cogens*. Even Judge Trindade's separate opinion, while normatively powerful and emotionally compelling, reflects this conflation, compressing multiple legal categories into a single frame, which obscures important distinctions.

Be that as it may, the IACtHR was explicit in that "no matter the circumstances in any State, there exist an absolute prohibition of torture, forced disappearances of individuals and summary and extrajudicial executions; and that such prohibition constitutes a mandatory rule of International Law not subject to derogation".¹⁰⁸⁸

In sum, both the HRC and the IACtHR appear to advance important normative claims about the centrality of non-derogable rights, but their overlapping treatment of *jus cogens* and non-derogability blurs critical legal distinctions and invites further clarification to ensure consistency in international law. What is clear is that none of the three bodies has provided a conceptual clarification of what it means for a right (not) to be absolute, at least in the context of the right to life. Nonetheless, there appears to be a consensus that the right to life, in its entirety, is not absolute and that its protection necessarily involves some form of proportionality assessment. However, certain aspects of the right to life have been characterised as absolute, such as the prohibition of forced disappearance within the Inter-American system. Moreover, as some scholars have also confirmed, it seems that all three bodies consistently agree that the prohibition of arbitrary deprivation of life enjoys absolute protection across the three systems.¹⁰⁸⁹

2. The Prohibition on the Death Penalty

*"Even if the meaning of the death penalty lay exclusively in retribution, it would still be meaningless. In order to measure true retribution, we must first understand its nature. And we do not understand the nature of death. The death we view as a punishment may well be a reward."**

– Borislav Pekić (An excerpt from a diary dictated into a tape recorder during 1983–1984)

The death penalty, which must be imposed by a sentence of a court and prescribed by law, is provided for in the first paragraph of Article 2 of the ECHR as an exception to the right to life, which is obvious from the words "save in". The provision reads as follow:

"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."

¹⁰⁸⁸ IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment of 4 July 2007, para. 96.

¹⁰⁸⁹ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 128; Vojin Dimitrijević, Dragoljub Popović, Tatjana Papić, Vesna Petrović, *Međunarodno pravo ljudskih prava* (Beograd: Beogradski centar za ljudska prava, 2007), 142.

* The translation of the quote from Serbian was carried out by the author of this thesis.

However, Protocol No. 6 to the Convention, adopted in 1984, abolished the death penalty, stating in Article 1 that “the death penalty shall be abolished” and that “No one shall be condemned to such penalty or executed”, allowing for its application only in time of war or of imminent threat of war.¹⁰⁹⁰ Article 3 of this Protocol proclaim it to be non-derogable under the ECHR. All CoE Member States have ratified it, except for Russia, which nevertheless respected a firm moratorium on the death penalty and did not sentence anyone to it after joining this organisation in 1996.¹⁰⁹¹

The complete abolition of the death penalty in all circumstances was achieved with the entry into force of Protocol No. 13 to the Convention in 2002.¹⁰⁹² Article 1 states that “the death penalty shall be abolished” and that “No one shall be condemned to such penalty or executed”. The following article prohibits any derogation from the provisions of this Protocol. All Member States have ratified it, except for Azerbaijan, that only recently signed it, in 2023.¹⁰⁹³

As a result of this Protocol, the CoE became the only international organisation whose members have fully abolished the death penalty, ensuring the most comprehensive protection of the right to life achieved so far.¹⁰⁹⁴

The ECtHR’s approach to the death penalty has evolved over the years. In its 1989 judgment in *Soering v. the United Kingdom* case, the Court declined to find the death penalty incompatible with Article 3 *per se*, reasoning that “Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2”, but admitted that “Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace”.¹⁰⁹⁵

In the 2005 judgment regarding *Öcalan v. Turkey* case, the Court took its reasoning a step further. It considered the fact that “the *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia”, as well as that “this almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia” and finally that “it is further reflected in the policy of the Council of Europe, which requires that new member States undertake to

¹⁰⁹⁰ Council of Europe, *Protocol 6 to the European Convention on Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, ETS 114, 28 April 1983.

¹⁰⁹¹ Tom Casier, “A Classic Dilemma: Russia’s Threat to Withdraw from the Council of Europe”, Heinrich Böll Stiftung, 21 February 2018, available at <https://eu.boell.org/en/2018/02/21/classic-dilemma-russias-threat-withdraw-council-europe> (accessed 29.3.2025).

¹⁰⁹² Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, ETS 187, 3 May 2002.

¹⁰⁹³ Council of Europe, *Chart of signatures and ratifications of Treaty 187, Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, ETS 187, available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=187> (accessed 29.3.2025).

¹⁰⁹⁴ Zdravković, „Pravo na život”, 349.

¹⁰⁹⁵ ECtHR, *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, para. 103.

abolish capital punishment as a condition of their admission into the organisation".¹⁰⁹⁶ The Court acknowledged that the widespread lack of ratification of Protocol No. 13 among member states at the time prevented it from declaring the death penalty to be universally considered contrary to Article 3, therefore, stating that it was unnecessary to make a definitive ruling on this issue, since, regardless of whether Article 2 still permits the death penalty, enforcing a death sentence following an unfair trial would, in any case, violate the Convention.¹⁰⁹⁷

It was only in the 2010 case of *Al-Saadoon and Mufdhi v. the United Kingdom* that the ECtHR accepted that Article 2 had evolved to prohibit the death penalty in all circumstances, basing this conclusion on the near-universal signature and ratification of Protocol No. 13 by CoE member states and the consistent state practice of abolishing the death penalty and observing moratorium on it.¹⁰⁹⁸ As a result, Article 2 no longer poses an obstacle to interpreting the death penalty as inhuman or degrading treatment or punishment and contrary to Article 3.¹⁰⁹⁹ According to the Court's established case law, for treatment to fall under Article 3, it must reach a minimum level of severity, and the assessment of that threshold depends on all relevant circumstances of the case and for a punishment or the treatment linked to it to be considered "inhuman" or "degrading", the level of suffering or humiliation must exceed what is an inevitable element of suffering or humiliation stemming from a legitimate treatment or punishment.¹¹⁰⁰

Nonetheless, the overall tenor of the judgment suggests that the Court regarded the death penalty, by its very nature, as inherently constituting inhuman and degrading treatment,¹¹⁰¹ particularly in light of the grave and irreversible harm and its explicit recognition of "the absolute and fundamental nature of the right not to be subjected to the death penalty"¹¹⁰².

Given that CoE member states have abolished the death penalty, the risk of it being imposed or carried out does no longer exist for individuals under their jurisdiction. However, a contracting state may extradite an individual to another country where the death penalty is still in force and being used. For this reason, the ECtHR established the rule that Article 2 of the ECHR and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another state where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.¹¹⁰³

This shift in the approach to the prohibition of death penalty marked a departure from earlier case-law and indicated that European states were increasingly reaching consensus against capital punishment.¹¹⁰⁴ The right not to be subjected to the death penalty has been explicitly recognised as absolute within this regional system, both by the Court and by

¹⁰⁹⁶ ECtHR, *Öcalan v. Turkey*, App. No. 46221/99, Judgment of 12 May 2005, para. 163.

¹⁰⁹⁷ *Ibid*, para. 165.

¹⁰⁹⁸ ECtHR, *Al-Saadoon and Mufdhi v. UK*, App. No. 61498/08, Judgment of 2 March 2010, para. 120.

¹⁰⁹⁹ *Ibid*.

¹¹⁰⁰ *Ibid*, para. 121.

¹¹⁰¹ Zdravković, „Pravo na život”, 350.

¹¹⁰² ECtHR, *Al-Saadoon and Mufdhi v. UK*, para. 138.

¹¹⁰³ *Ibid*, para. 123.

¹¹⁰⁴ Zdravković, „Pravo na život”, 350.

scholars who have indicated that this status derives from the elimination of all permissible exceptions.¹¹⁰⁵ This development could also serve as a model for states outside the Council of Europe, promoting the absolute protection of this prohibition worldwide.

The only explicit exception to the right to life provided by the ICCPR is the death penalty under Article 6, paragraph 2, stipulating that:

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

Moreover, Article 6 states that:

“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases;

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

The Human Rights Committee has emphasised that states which have abolished the death penalty, either by ratifying the Second Optional Protocol to the Covenant of 1989,¹¹⁰⁶ or by adopting another international instrument with the same aim, are barred from reintroducing it, as well as that the abolition of the death penalty is legally irrevocable.¹¹⁰⁷ It has also made clear that the phrase “the most serious crimes” refers only to offenses involving intentional killing,¹¹⁰⁸ and that any court imposing the death penalty must be established by law, independent of the executive and legislative branches, and impartial.¹¹⁰⁹

State’s duty to respect and protect the right to life also means that it would be contrary to Article 6 to extradite someone from a country that had abolished the death penalty to a country in which he or she might face it.¹¹¹⁰ This obligation goes beyond the principle of *non-refoulement* under international refugee law, as it may also require the protection of aliens not entitled to refugee status.¹¹¹¹

Finally, the Committee encouraged states to “be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future”, stating that this is not only desirable but also necessary for the enhancement of human dignity and the progressive development of human rights.¹¹¹²

¹¹⁰⁵ See for instance Smith, “The Right to Life”, 220-226.

¹¹⁰⁶ UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, A/RES/44/128, 15 December 1989.

¹¹⁰⁷ HRC, *CCPR General Comment No. 36*, para. 34.

¹¹⁰⁸ *Ibid*, para. 35.

¹¹⁰⁹ *Ibid*, para. 45.

¹¹¹⁰ *Ibid*, para. 30.

¹¹¹¹ *Ibid*, para. 31.

¹¹¹² *Ibid*, para. 50.

While the Committee was successful in systematizing and clarifying the obligations and standards associated with the right to life, it stopped short of taking a more progressive stance by declaring that the death penalty, by its very nature, amounts to inhuman or degrading punishment, and that its imposition equals to a violation of Article 7 of the ICCPR.¹¹¹³ Such a determination would have been consistent with the jurisprudence of the ECtHR and might have served as a decisive incentive for states that have yet to abolish the death penalty.¹¹¹⁴

Instead, the Committee highlighted the growing international momentum toward abolition, which is apparent from the rising number of ratifications of the Second Optional Protocol and other international instruments prohibiting capital punishment, and which could also serve as a possible basis for considering the death penalty incompatible with Article 7 in the future.¹¹¹⁵ Such an evolution would naturally align with the pro-abolitionist spirit of the Covenant.¹¹¹⁶

To be fair, the ECtHR itself did not immediately classify the death penalty as contrary to Article 3, but rather waited cautiously until nearly all member states had abolished it.¹¹¹⁷ The key difference lies only in the fact that the European Court addressed this issue more than a decade ago.¹¹¹⁸

Following in the footsteps of the ICCPR, the only explicit exception permitted under Article 4 of the ACHR is also the death penalty, stating that:

“In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

The death penalty shall not be reestablished in states that have abolished it.

In no case shall capital punishment be inflicted for political offenses or related common crimes.

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.”

Alongside the American Convention, a Protocol for the Abolition of the Death Penalty was adopted in 1990, but to date, fewer than half of the Convention’s State Parties have

¹¹¹³ Zdravković, „Pravo na život”, 345.

¹¹¹⁴ *Ibid.*

¹¹¹⁵ HRC, *CCPR General Comment No. 36*, para. 51.

¹¹¹⁶ *Ibid.*

¹¹¹⁷ Zdravković, „Pravo na život”, 345.

¹¹¹⁸ *Ibid.*

ratified it.¹¹¹⁹ This indicates that while there is some support for the abolition of the death penalty within the region, a significant number of member states have yet to commit fully to this Protocol.

Still, the Inter-American Court of Human Rights has examined in various occasions whether death penalty was in contravention to the ACHR.¹¹²⁰ For example, the Court found a violation of Article 4 where a state extended the death penalty to the crime of kidnapping, which does not fall within the category of the most serious offenses.¹¹²¹

Recent judgments have certainly strengthened the abolitionist spirit, with the Court, for instance, affirming that the execution of a person after an unfair trial violates the right to life and judicial guarantees and reiterated that any use of the death penalty must strictly comply with all procedural and substantive guarantees.¹¹²²

Hence, the Court's case law reflects a broader regional shift toward abolition, even though several Caribbean states retain the death penalty, the Court's rulings have nonetheless pressured domestic legal reform, while its approach to the death penalty exemplifies a dynamic and evolving human rights jurisprudence that seeks to harmonise regional standards with international human rights law.¹¹²³

In any case, the evolution of the prohibition of the death penalty across universal and regional human rights systems reveals a clear normative inclination toward its complete abolition and increasing recognition of its incompatibility with certain fundamental rights. Nowhere is this development more advanced than in the European human rights system, where the abolition of capital punishment is not only *de facto* but also *de jure* grounded in binding treaty law and judicial interpretations declaring it incompatible with both the right to life and the absolute protection against inhuman and degrading treatment enshrined in Article 3. Moreover, the Court has explicitly affirmed that the right not to be subjected to the death penalty has attained the status of an absolute right, at least in this system. This was reiterated recently in 2023, at the 4th Summit of the Council of Europe, where it was stated that "the Council of Europe has played a crucial role to ensure that Europe is a death penalty-free zone and it should pursue the fight against the reintroduction of the death penalty, and in favour of its universal abolition, in all places and in all circumstances", "ensuring that the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment is upheld".¹¹²⁴

While the ICCPR and the ACHR still retain the death penalty as an explicit exception to the right to life, both systems are inclining towards abolition, primarily through

¹¹¹⁹ Organisation of American States, *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OAS Treaty Series, No. 73, 8 June 1990, <http://www.oas.org/juridico/english/Sigs/a-53.html> (accessed 29.3.2025).

¹¹²⁰ See for instance IACHR, *Boyce et al. v. Barbados*, Judgment of 20 November 2007; IACHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002.

¹¹²¹ IACHR, *Raxcaco Reyes v. Guatemala*, Judgment of 15 September 2005, paras. 68-72.

¹¹²² IACtHR, *Girón and Gómez v. Guatemala*, Judgment of 15 October 2019, paras. 74, 123. In this judgment, Court followed the reasoning of the ECtHR regarding the "death-row" phenomenon being contrary to the prohibition of ill-treatment, para. 79.

¹¹²³ Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *European Journal of International Law* 19, no.1 (2008): 101-123; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2013).

¹¹²⁴ Council of Europe, *Abolition of the death penalty, Timeline*, available at <https://www.coe.int/en/web/abolition-death-penalty/timeline> (accessed 31.3.2025).

interpretative clarifications and the adoption of optional protocols, with their monitoring bodies developing a strong abolitionist jurisprudence, gradually restricting the scope of the death penalty's application and reinforcing procedural guarantees, while leaving open the possibility for a more categorical rejection in the future. This is reinforced in the recent resolution adopted within UN concerning the moratorium on the death penalty with 130 votes in favour, which is 5 votes more than two years before.¹¹²⁵

As indicated, regarding the question whether the prohibition of the death penalty has been considered as an absolute right, only the European system has crossed that threshold. In other systems, the shift from conditional acceptance to irrevocable abolition has yet to be achieved.

3. The Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment

"Torture is a vain fury, born of fear: they want to extract from one throat, in the midst of the screams and vomiting of blood, everyone's secret. Useless violence: whether the victim talks or dies beneath the blows, the vast secret is elsewhere, always elsewhere, out of reach; the torturer turns into Sisyphus: if he applies torture, he will have to begin over and over again."

– Jean-Paul Sartre (*Colonialism and Neocolonialism*, 1964)

Before embarking on the absolute nature of the prohibition of torture, at least two remarks are needed. Firstly, when it comes to doctrinal views, scholars have predominantly examined it within the framework of Article 3 of the ECHR, hence, their views will mostly be presented through an analysis of this specific provision. Then, it should also be noted that, for the sake of clarity and better textual flow, "ill-treatment" will be employed as a general reference to all forms of prohibited conduct under this right, while "expulsion" will be used with regard to the removal of a person from a member state for any reason, be it extradition or any other form of removal.

Article 1 of the Paris Minimum Standards, that guarantees the right to legal personality, in its second paragraphs states that "the inherent dignity of the human person shall be respected" as well as that "every person has the right to have his physical, mental and moral integrity respected".¹¹²⁶ Moreover, indicating the significance of the prohibition at hand, the document also includes a special article dedicated to the freedom of torture, which in a rather detailed manner sets out this provision.¹¹²⁷

¹¹²⁵ UN General Assembly, *Resolution on Moratorium on the Use of the Death Penalty*, A/RES/79/179, 17 December 2024, available at <https://digitallibrary.un.org/record/4069732> (accessed 31.3.2025).

¹¹²⁶ Lillich, *The Paris Minimum Standards*, 1075.

¹¹²⁷ Article 6 of the Paris Minimum Standards reads as follows:

"1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

2. Every state shall, in accordance with the provisions of the 1975 United Nations Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.

3.1. The Prohibition of Ill-Treatment in the ECHR - The “Absolutest” of Them All

It can be stated with confidence that the vast majority of scholars who have contemplated on the ECHR, and particularly Article 3, have acknowledged its absolute nature in one way or another. Take for instance, Dembour, who maintained that apart from Article 3, the Convention does not shy away from engaging in utilitarian trade-offs.¹¹²⁸ She also noticed that the absolute character of the prohibition is often the first thing mentioned about Article 3 in the most commentaries on the ECHR.¹¹²⁹ Neil Graffin elucidated that it has been

3. In particular, in the context of the principles recognised in the said 1975 Declaration, every state shall:

- (a) ensure that acts of torture as defined in article 1 are offences under its criminal law as enjoined by article 4;
- (b) frame general rules or instructions with regard to the training, functions, duties and requirements of law enforcement personnel and other public officials who are involved in the detention and interrogation of all persons deprived of their liberty (article 5);
- (c) review systematically the interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty (article 6);
- (d) conduct an impartial investigation by a competent authority whenever there is reason to believe that any act prohibited as aforesaid has been committed, whether or not a formal complaint is received (articles 8 and 10);
- (e) institute criminal, disciplinary or other appropriate proceedings against the alleged offender or offenders if investigation establishes that such offence is suspected of having been committed (articles 9 and 10);
- (f) afford appropriate compensation to the victim in accordance with national law (article 11) and inflict adequate punishment for the offender or offenders proved guilty;
- (g) declare as inadmissible evidence, in any proceedings against the person concerned, any statement obtained as a result of an act prohibited as aforesaid.

4. The law of evidence shall not be amended so as to give additional incentives for obtaining confessions.

5. Every detainee shall be examined by a doctor soon after his arrest and his physical and mental condition duly recorded and signed by the doctor; thereafter periodical medical examinations shall be held and records thereof duly maintained. The detainee shall have the opportunity at all times to consult a doctor of his own choice.

6. With regard to the procedures for interrogation, every person in detention shall be entitled to the following minimum guarantees:

- (a) all persons participating in interrogation shall be duly identified;
- (b) rules shall be framed limiting the hours during which interrogation may occur and records shall be kept of all periods of interrogation with the names of all persons present;
- (c) interrogation shall be subject to direct supervision by superior officers, and shall occur in conditions which permit this control to be exercised.

7. The establishment or infliction of such punishment as summary executions by firing squads, public hangings, floggings, the amputation of limbs and other cruel, inhuman or degrading forms of punishment are gross violations of international standards of humane treatment”, see Lillich, *The Paris Minimum Standards*, 1077-1078.

¹¹²⁸ Dembour, *Who Believes in Human Rights?*, 70.

¹¹²⁹ *Ibid*, 75. She referred to Clare Ovey, Robin White, *Jacobs and White: European Convention on Human Rights* (Oxford: Oxford University Press, 2002), 58; Philip Leach, *Taking a Case to the European Court of Human Rights*, 1st ed. (London: Blackstone, 2001), 113; David Harris, Michael O’Boyle and Carla Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 55.

described as an “absolute right, as it is framed in absolute terms”.¹¹³⁰ The same explanation of “absolute terms”, which do not allow any express limitation by reference to saving clauses or derogation is adopted by Yutaka Arai-Yokoi,¹¹³¹ who took a view that the absolute character of the right protected under Article 3 implies that no appeal to public interest, regardless of how compelling, can justify the use of torture.¹¹³² Scott Sheeran and Catherine Bevilacqua also held that although many human rights are not absolute in nature and need to be balanced against the goals of society and the state as a whole, few rights, such as the prohibition against torture, are not subject to any limitations under any circumstances.¹¹³³ Moreover, Ralph Wilde even argued that the law imposes an absolute prohibition on breaches of non-derogable rights, such as the right to be free from torture.¹¹³⁴

Interestingly enough, Enni Lehto noted that Article 3 is the only right which is considered absolute under the ECHR, as it is “the only article that does not include any qualifications, exceptions or restrictions, overt or implied”, specifying that “since the prohibition is unqualified it must be interpreted, and indeed has been interpreted, as absolute”.¹¹³⁵ While this may be contested, since arguably ECHR contains other unqualified provisions,¹¹³⁶ Lehto confirmed that in absolute cases there cannot be any justification for the prohibited conducts, as their purpose is relevant only for the qualification of the treatment in question, that is, for determining whether it will amount to torture or some other kind of ill-treatment.¹¹³⁷ Finally, it was also confirmed that the concept of absoluteness necessarily entails either-or dichotomy, and that even a single exception would jeopardise this nature of the right.¹¹³⁸ Although Lehto identified certain exceptions in the form of balancing in the Court’s jurisprudence regarding Article 3 expulsion cases, the author found that the true purpose of repeated references to absoluteness lies in its argumentative

¹¹³⁰ Neil Graffin, “Gäfgen v Germany, the Use of Threats and the Punishment of Those Who Ill-Treat During Police Questioning: A Reply to Steven Greer”, *Human Rights Law Review* 17, no. 4 (2017): 685.

¹¹³¹ Arai-Yokoi, “Grading Scale of Degradation”, 386.

¹¹³² *Ibid*, 389. Author also noted that the absolute prohibition of torture supports a victim-centred approach with a relatively low threshold of fault on the part of state authorities, the requirement of purpose indicates that the minimum level of culpability should fall between recklessness and deliberate intent, *ibid*. The Court ruled that the need for practical and effective guarantee of rights of an “absolute” nature enabled the standard of negligence to be tuned at a low level, with an individual applicant required to prove only that the authorities of a Member State “had or ought to have had knowledge” of such ill-treatment, *ibid*, 393. However, the Court concluded that the local authority dealing with social services was not negligent in its duty to take effective steps to protect the applicants from sexual abuse inflicted by their stepfather, absent proof that the authority should have been aware of such abuse. See ECtHR, *D.P. & J.C. v. UK*, App. No. 38719/97, Judgment of 10 October 2002, paras. 109, 114.

¹¹³³ Scott Sheeran and Catherine Bevilacqua, “The UN Security Council and international human rights obligations”, in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 382.

¹¹³⁴ Ralph Wilde, “The extraterritorial application of international human rights law on civil and political rights”, in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 656.

¹¹³⁵ Enni Lehto, “Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe”, *Helsinki Law Review* 1 (2018): 57.

¹¹³⁶ Take for instance Article 4, para. 1 of the ECHR, or Article 1 of the Protocol No. 4 to the ECHR.

¹¹³⁷ Lehto, “Applicability of Article 3”, 59. Similar view can be found in Stephanie Palmer, “A Wrong Turning: Article 3 ECHR and Proportionality”, *The Cambridge Law Journal* 65, no. 2 (2006): 451.

¹¹³⁸ *Ibid*, 73.

capacity through which the Court extends the scope of this right.¹¹³⁹ For Michelle Farrell, the absolute prohibition encompass the right to “be treated as a human”, by not just codifying a moral absolute, but also “the absolute right not to be reduced to a status of rightlessness of a bare life”¹¹⁴⁰ in the hands of state.¹¹⁴¹

Scholars also explained that it was the severe and serious physical and mental suffering, as well as the degree of intensity of cruelty to which individuals have been subjected in numerous previously established instances of inhuman treatment, that have led to the necessity of the absolute protection afforded by Article 3.¹¹⁴² The absolute nature of Article 3 is justified by the need to address and remedy the consequences of its violation, as it primarily safeguards human dignity and integrity, hence it is “an essential and inalienable human right, and represents one of the most valuable achievements of modern democratic society”.¹¹⁴³ This connection between inherent human dignity and the protection of human rights is also recognised as one of the reasons for absolute and non-derogable prohibition of torture by Farrell, who explained that it derives from the recognition that it is impossible to imagine “a good reason” for an exception to this right, as well as from the absence of a causal link between this and other rights, which prevents it from coming into conflict with any.¹¹⁴⁴ Elaine Webster saw human dignity as central for understanding degradation, since it is a fundamental value that shapes interpretation, with high aspirational quality that offers a kind of guiding ideal.¹¹⁴⁵ Graffin admitted that despite its being a vague term, most of human rights language is not immune to ambiguity of some sort.¹¹⁴⁶ Finally, Arai-Yokoi underscored that, in the eyes of the Commission, violations of these rights strike not only at the individual dignity but at the whole European public order.¹¹⁴⁷

A slightly different account was offered by Finnis, who confirmed that Article 3 is an absolute norm, but underlined that its absoluteness can only make sense if it bans all intentional torture or inhuman or degrading treatment, not if it demands absolute avoidance of all risk of such treatment, which would be both contrary to the rule of law and a standard that no one could consistently uphold in practice.¹¹⁴⁸

In any case, as Michael K. Addo and Nicholas Grief insightfully noted, neither the Court nor the Commission have clearly defined what constitutes an absolute right, but instead, it

¹¹³⁹ *Ibid.*

¹¹⁴⁰ Stanley Cohen, “Post-Moral Torture: From Guantanamo to Abu Ghraib”, *Index on Censorship* 34 (2005): 24, 26.

¹¹⁴¹ Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press, 2013), 243.

¹¹⁴² Lada Sadiković, “Apsolutno zaštićena ljudska prava”, *Kriminalističke teme, Fakultet kriminalističkih nauka* 1–2 (2002): 222.

¹¹⁴³ *Ibid.*, 223.

¹¹⁴⁴ Farrell, *The Prohibition of Torture*, 79-80.

¹¹⁴⁵ Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law* (Routledge, 2018), 48.

¹¹⁴⁶ Neil Graffin, “From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights”, in *Law in Motion: 50 Years of Legal Change*, eds. Lisa Claydon, Caroline Derry, and Marjan Ajevski (The Open University Law School, 2020), 61.

¹¹⁴⁷ Arai-Yokoi, “Grading Scale of Degradation”, 386.

¹¹⁴⁸ Finnis, “Absolute Rights”, 199-200.

is generally assumed by both practitioners and scholars that the absence of limitations, exceptions, or derogations indicates that a right is absolute.¹¹⁴⁹

This view is supported by a reading of Articles 3 and 15, which strongly suggests that the drafters intended Article 3 rights to be superior in that it is non-derogable and without exception—a conclusion echoed in the *travaux préparatoires* and debates within the Consultative Assembly.¹¹⁵⁰ For example, the UK delegate has expressed that “the Consultative Assembly takes this opportunity of declaring that all forms of physical torture [...] are inconsistent with civilised society, are offences against heaven and humanity, and must be prohibited. It declares that this prohibition must be absolute, and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State. It believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain”.¹¹⁵¹ Maybe even more importantly for capturing the general sentiment on this matter, other delegates welcomed his views—no one opposed his “fierce absolutism on this issue”.¹¹⁵² Malcolm Evans and Rod Morgan also confirmed that all draft versions of the Convention seemed to follow the same “unconditional prohibition” approach to Article 3, hence this format was undisputed.¹¹⁵³

The prohibition of torture under the ECHR is enshrined in Article 3, which states that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

As already indicated, it is one of the few rights in the ECHR that admits of no exceptions, namely has no limitation clause nor contain pinpoint exceptions and it is also non-derogable according to the Article 15 of the ECHR.

One of the Court’s most well-known and recognisable statements regarding this Article, appearing in virtually every judgment concerning it, affirms that “Article 3 enshrines one of the most fundamental values of democratic societies” and 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”, as well as that “unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation”.¹¹⁵⁴

Similarly, the Court sometimes uses the phrase “in contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of

¹¹⁴⁹ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 513.

¹¹⁵⁰ *Ibid*, see also Council of Europe, *Collected Edition of the Travaux Préparatoires* I (1975): 252-254 and II (1975): 4, 10, 12, 38 and 84.

¹¹⁵¹ Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights* II (1949): 36–40.

¹¹⁵² Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford, New York: Oxford University Press, 2010), 214.

¹¹⁵³ Malcolm Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998), 70.

¹¹⁵⁴ ECtHR, *Selmouni v. France*, App. No. 25803/94, Judgment of 28 July 1999, para. 95.

derogation”¹¹⁵⁵, but it has also referred to it as “having an absolute character”¹¹⁵⁶ and described it explicitly as an “absolute right”¹¹⁵⁷. Such categorical statements, combined with unqualified wording of Article 3, led Mavronicola to conclude that the ECtHR understands this right in accordance with her applicability parameter, namely that a right is absolute if it cannot be justifiably infringed.¹¹⁵⁸

Dembour also interpreted this to imply that Article 3 imposes an absolute negative obligation and consequently, when faced with allegations of a violation, the Court’s inquiry is limited to two questions: first, whether the act occurred, and second, whether it can qualify as torture.¹¹⁵⁹ It truly seems as if the Court’s approach reflects a deontological mode of reasoning, focusing on (the intrinsic wrongfulness of) the act itself rather than on any potential justifications, thereby preserving the absolute nature of right and underscoring that certain harms are categorically impermissible, regardless of context or motive.

To borrow words of Mavronicola, “both in theory and in the ECtHR’s discourse absoluteness entails that the relevant standard is non-displaceable”, hence, “once it is found applicable, the right applies no matter what” and therefore, “infringement of this right is thus conclusively unlawful”.¹¹⁶⁰

This either-or trait of absoluteness, which means that either Article 3 was breached, which is conclusively unlawful or it was not breached, puts the spotlight on what Mavronicola identified as the central question, and that is the specification parameter, which reveals how to define what counts as a breach, that is, what falls within the scope of the right.¹¹⁶¹ Even though the content of the specific rights is not the concern of this thesis, some clarifications are still in order.

Similar to the vast majority of other articles, the Court interpreted Article 3 as if it encompasses both negative and positive obligations of states, meaning not only that they must refrain from committing such acts, but also prevent them, investigate, and prosecute those accountable for them. In context of Article 3, the obligation to carry out a prompt and effective investigation even in situations where the perpetrator is a private individual is immensely significant and closely linked to the right to an effective remedy under Article 13 of the ECHR.¹¹⁶² In one of its recent cases, the Court has explicated that “there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence”, but that “the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishments”.¹¹⁶³

¹¹⁵⁵ ECtHR, *Pretty v. UK*, App. No. 2346/02, Judgment of 29 April 2002, para. 49.

¹¹⁵⁶ ECtHR, *Chahal v. UK*, App. No. 22414/93, Judgment of 15 November 1996, para. 96.

¹¹⁵⁷ ECtHR, *Al-Adsani v. UK*, App. No. 35763/97, Judgment of 21 November 2001, para. 59.

¹¹⁵⁸ Natasa Mavronicola, “What is an ‘Absolute Right’? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights”, *Human Rights Law Review* 12, no.4 (2012): 737.

¹¹⁵⁹ Dembour, *Who Believes in Human Rights?*, 75.

¹¹⁶⁰ Mavronicola, “What Is an ‘Absolute Right’?”, 738.

¹¹⁶¹ *Ibid*, 739.

¹¹⁶² Arai-Yokoi, “Grading Scale of Degradation”, 398.

¹¹⁶³ ECtHR, *Sabalić v. Croatia*, App. No. 50231/13, Judgment of 14 January 2021, para. 97.

Stephanie Palmer divided positive obligations into the duty to effectively investigate alleged violations and to protect individuals from prohibited treatment.¹¹⁶⁴ This kind of strong protection could be understood as a reflection of the fundamental value that human dignity plays in the Convention system.

As Dembour has insightfully observed, the fact that the Convention gives implicit priority to negative obligations is corresponding to the absolutist understanding of human rights, which stipulates clear, non-negotiable prohibitions, whereas positive obligations inherently require some kind of balancing, which is a process that necessarily departs from absolutism, as it introduces an element of relativism.¹¹⁶⁵ Lehto also confirmed that, at least in principle, any balancing is precluded in case of absolute rights.¹¹⁶⁶

The relevance of this differentiation is especially evident in light of certain claims in human rights law that only negative obligations can be regarded as absolute, since they operate in a binary manner and they can be either fully respected or entirely breached, without room for proportionality, whereas positive obligations are inherently less precise, with their boundaries being harder to draw, and they may therefore lack an absolute character.¹¹⁶⁷ Or, to take an even more radical perspective, Steven Greer has argued that while the prohibiting principle (embedded in Article 3) is susceptible of being absolute, the right itself may not be.¹¹⁶⁸ Notwithstanding the fact that it was already explained in this thesis that the nature of principles is hardly reconcilable with absoluteness, Greer, in any case, preferred avoiding the term “absolute” altogether and instead described the principles enshrined in these provisions as “formally unqualified”, indicating that while the rights derived from them may not themselves be absolute, they hold a distinct status whose nature and scope should be defined through the application of the Convention’s constitutional principles.¹¹⁶⁹

On the other hand, Palmer insisted that both negative and positive obligations should be considered absolute, as their breach give rise to the same consequences, which is the responsibility of state.¹¹⁷⁰ Stijn Smet agreed with her, rebutting objections that positive obligations are not absolute by explaining that they mix two different questions: that of the scope of the obligation and that of whether it can be balanced against the public interest.¹¹⁷¹ Nonetheless, he specified his view, clarifying that unlike abstract obligation of the state to prevent ill-treatment, only a concrete obligation to protect individuals from a specific ill-

¹¹⁶⁴ Palmer, “A Wrong Turning”, 440.

¹¹⁶⁵ Dembour, *Who Believes in Human Rights?*, 81.

¹¹⁶⁶ Lehto, “Applicability of Article 3”, 67.

¹¹⁶⁷ Sébastien Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme - Prendre l’idée simple au sérieux* (Presses universitaires Saint-Louis Bruxelles, 2001) 158, as cited in Dembour, *Who Believes in Human Rights?*, 82-83.

¹¹⁶⁸ Steven Greer, “Constitutionalizing Adjudication under the European Convention on Human Rights”, *Oxford Journal of Legal Studies* 23, no.3 (2003): 416.

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ Palmer, “A Wrong Turning”, 451.

¹¹⁷¹ Stijn Smet, “The ‘Absolute’ Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?”, in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems, Janneke Gerards (Cambridge University Press, 2013), 295.

treatment of which the state should have been aware can function as absolute.¹¹⁷² Put differently, states may be allowed a certain degree of discretion with regard to their positive obligations, but they can never justify non-compliance with overriding considerations.¹¹⁷³

Scholars have described the ECtHR's approach as categorical in respect to both negative and positive obligations under Article 3. For instance, in a case concerning assisted suicide,¹¹⁷⁴ it has been argued that the Court should have interpreted the issue as the one regarding the positive obligations under Article 3, by recognizing that the state acted within its margin of appreciation by balancing the impact that the measure had on protecting vulnerable individuals from inhuman or degrading deaths when deciding to criminalise assisted suicide.¹¹⁷⁵ However, the Court adopted a form of a black-and-white, absolutist reasoning, which is more typical for negative obligations, thereby avoiding the complex balancing that positive obligations usually entail.¹¹⁷⁶

Similarly, Mavronicola shared this view, as her interpretation of the Court's reasoning suggested that once positive obligations are triggered, they cannot be overridden.¹¹⁷⁷

However, the question that remains open is what exactly they encompass, as this is "an umbrella duty on States" to "'take measures' to protect individuals within their jurisdiction from the proscribed treatment".¹¹⁷⁸ She maintained that positive obligations are necessary to protect an absolute right, but they cannot be boundless, and that it is difficult to accept that positive obligations impose direct action in violation of the negative obligation of an absolute right.¹¹⁷⁹

Furthermore, it should also be taken into account that the use of fluid language, such as "adequate measures"¹¹⁸⁰ or "reasonable steps"¹¹⁸¹ that states may be required to take within their positive obligations may lead to what Mavronicola called "internal displacement" of the right, that runs counter to the applicability criterion or may even include some form of consequentialist reasoning, which is incompatible with the nature of absolute rights.¹¹⁸² As absoluteness signifies that rights (and obligations) cannot be displaced, the delimitation of the scope of positive obligations must be approached rigorously, in order to carefully assess appropriateness, sufficiency and good faith of state's conduct, but without slipping into the displacement.¹¹⁸³ Such scrutiny is crucial in order to make sure that the positive obligations

¹¹⁷² *Ibid*, 296.

¹¹⁷³ *Ibid*.

¹¹⁷⁴ ECtHR, *Pretty v. UK*, paras. 55-56. The Court was categorical in that the ECHR requires states to sanction all acts taken in order to terminate life.

¹¹⁷⁵ Dembour, *Who Believes in Human Rights?*, 83.

¹¹⁷⁶ *Ibid*.

¹¹⁷⁷ Mavronicola, "What Is an 'Absolute Right'?", 738.

¹¹⁷⁸ *Ibid*.

¹¹⁷⁹ *Ibid*, 748.

¹¹⁸⁰ This wording can be found in the Court's case law, see ECtHR, *Opuz v. Turkey*, App. No. 33401/02, Judgment of 9 June 2009, para. 165.

¹¹⁸¹ See ECtHR, *Z and Others v. UK*, App. No. 29392/95, Judgment of 10 May 2001, para. 73.

¹¹⁸² Mavronicola, "What Is an 'Absolute Right'?", 748.

¹¹⁸³ Mavronicola, *Torture, Inhumanity and Degradation under Article 3*, 55.

provide true protection instead of displacing a right and undermining its absoluteness.¹¹⁸⁴ Even though it was already explained in the first chapter of this analysis, it is worth reminding that Mavronicola offered her account on what should amount to the “legitimate specification of the right”, requiring that an absolute right must retain following characteristics:

- (1) it must have the capacity to guide;
- (2) it must be premised on reasoning which relates to the wrongs that the right proscribes; and
- (3) it must not amount to displacement of the right.¹¹⁸⁵

Hence, positive obligations can form part of an absolute right, as long as their specification is legitimate and stays true to the purpose of the right. After all, throughout her work, Mavronicola remained firm in her view that there can be no positive duty to act contrary to the negative duty under the absolute right, and even though she considered both aspects of the right absolute, she advanced that negative aspects should always prevail.¹¹⁸⁶

It was the European Commission in the *Greek case* that first laid out the elements that now shape how Article 3 is understood and specified that “‘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 is generally an aggravated form of inhuman and degrading treatment”.¹¹⁸⁷ In *Ireland v. the United Kingdom*, the Court moved away from the previously made distinction regarding the requirement for torture to have specific purpose, and instead focused on the intensity of the suffering as the key factor separating torture from inhuman treatment.¹¹⁸⁸ After this case, many came to view Article 3 as having hierarchical parts, with torture at the most severe end, followed by inhuman treatment or punishment, and then degrading treatment or punishment.¹¹⁸⁹

Although the prohibition under Article 3 is considered absolute, Addo and Grief noticed that both the Commission and the Court have acknowledged that assessing whether a specific act reaches the threshold of ill-treatment is inherently subjective.¹¹⁹⁰ Similarly, Lehto remarked that the absolute wording of the prohibition does not contribute to defining the precise scope of Article 3.¹¹⁹¹

To cite the Court on this matter, “ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3”, and that assessment is “in the nature of things, relative” and “depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its

¹¹⁸⁴ *Ibid*, 55.

¹¹⁸⁵ *Ibid*, 23-25.

¹¹⁸⁶ Mavronicola, “What is an ‘Absolute Right’?”, 723, 732; Mavronicola, *Torture, Inhumanity and Degradation under Article 3*, 13.

¹¹⁸⁷ Graffin, “From the Greek Case to the Present”, 54.

¹¹⁸⁸ *Ibid*, 55.

¹¹⁸⁹ *Ibid*; Evans, Morgan, *Preventing Torture*, Oxford University Press, 289.

¹¹⁹⁰ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 517.

¹¹⁹¹ Lehto, “Applicability of Article 3”, 58.

execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim".¹¹⁹²

So, severity and unjustifiability of suffering depend heavily on context, as perceptions of humiliation or cruelty vary between individuals and societies.¹¹⁹³

For Addo and Grief, this is evident, for instance, in cases like *Greece v. UK*, where the Court found that the treatment of political detainees, rather than common criminals, rendered their detention conditions in breach of Article 3.¹¹⁹⁴ After all, the Court itself has admitted that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future"¹¹⁹⁵.

A similar stance can also be traced in the literature, with for instance, Arai-Yokoi noting that the Strasbourg bodies have infused the notion of an "absolute right" with a degree of gradation or relativity, establishing the lowest threshold of severity in cases involving degrading treatment or punishment, as well as that the classifications of torture, inhuman, and degrading treatment are fluid, with their meaning being subject to evolution in response to shifting societal norms.¹¹⁹⁶

Criticism was also directed at the fact that both the Court and the scholarship distinguished between these terms in a somewhat simplistic, quantitative manner, primarily based on the varying degrees of inflicted suffering.¹¹⁹⁷ According to Waldron, this grading is obvious in stances such as that the prohibition of degrading treatment is "the lowest form of an absolute right on the graded scale of ill-treatment under Article 3".¹¹⁹⁸

What is more, it is also sometimes objected that the Court typically just states its conclusion that certain practices qualify as inhuman or degrading, while others do not, or announces a principle it intends to apply in determining what constitutes degrading or inhuman treatment, leaving much to be clarified, particularly with regard to the underlying reasons for such qualifications.¹¹⁹⁹

The Court's case-by-case, casuistic approach has faced strong criticism for making it difficult to establish general rules that extend beyond the specific circumstances of the case at hand.¹²⁰⁰ That is why Sébastien Van Drooghenbroeck advocated for the need to identify clear reference points to counter this, urging the Court to reaffirm the absolute character of

¹¹⁹² ECtHR, *Soering v. UK*, para. 100. See also ECtHR, *Ireland v. UK*, App. No. 5310/71, Judgment of 18 January 1978, para. 162; ECtHR, *Tyrer v. UK*, App. No. 5856/72, Judgment of 25 April 1978, paras. 29-30.

¹¹⁹³ Addo and Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?", 517.

¹¹⁹⁴ Addo and Grief, "Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?", 517.

¹¹⁹⁵ ECtHR, *Selmouni v. France*, para. 101.

¹¹⁹⁶ Arai-Yokoi, "Grading Scale of Degradation", 387.

¹¹⁹⁷ Waldron, *Torture, Terror, and Trade-Offs*, 284.

¹¹⁹⁸ Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (Oxford University Press, 2007) 227; Arai-Yokoi, "Grading Scale of Degradation", 420; Waldron, *Torture, Terror, and Trade-Offs*, 284.

¹¹⁹⁹ *Ibid*, 287. See for instance ECtHR, *Kurt v. Turkey*, App. No. 15/1997/799/1002, Judgment of 25 May 1998, paras. 133-134.

¹²⁰⁰ See for example Van Drooghenbroeck, Chapter VII, as cited in Dembour, *Who Believes in Human Rights?*, 90.

non-derogable rights and protect the substance of all fundamental rights through consistent application of norms.¹²⁰¹

A good example of this subjective character of such assessments is the case *Ireland v. UK*, where the Court determined that the infamous “five techniques” when used for many hours did not satisfy the necessary threshold, although the Commission decided that they amounted to torture.¹²⁰² Separate opinion of Judge Fitzmaurice went even further, denying that the techniques amounted to inhuman or degrading treatment at all, underscoring the variability in interpretation.¹²⁰³ As a result, Addo and Grief claimed that this subjectivity introduces a significant risk of inconsistency in the Court’s Article 3 case-law.¹²⁰⁴

Another interesting case is *Klass v. Germany*,¹²⁰⁵ where the Court found no violation of Article 3, despite evidence of injuries experienced during an arrest, mostly due to the fact that the manner in which they were sustained was inconclusive, thereby departing from its previous strict approach taken in *Tomasi v. France*,¹²⁰⁶ where the burden was placed on the state to disprove responsibility for injuries sustained in custody. *Klass* is thus said not only to have lowered the evidentiary threshold but also weakened the normative force of Article 3 as an absolute guarantee and can serve as an additional example of the ambiguity which is present in cases of physical ill-treatment.¹²⁰⁷

Still, there is nothing necessarily problematic in that the content of these rights is context sensitive. As Waldron correctly noted, specific experiences of degradation may vary across cultures, for instance, what a Muslim man finds degrading may not affect an American the same way, but the core idea of degradation remains consistent.¹²⁰⁸ Across all cultures, it involves being compelled to act against one’s deeply held beliefs, particularly those related to chastity, modesty or piety.¹²⁰⁹ Hence, the treatment as such can be regarded as absolutely forbidden everywhere. And what constitutes that treatment is dependent on many factors.

Lehto agreed with this line of reasoning, noting that the “relativism” is not an obstacle for the absolute nature of Article 3, as it is a form of interpretation that offers enough flexibility to tailor protection to each and every individual and their needs.¹²¹⁰

While there are claims that determining whether the severity threshold has been met inescapably involves proportionality considerations, Palmer took a stance that is a

¹²⁰¹ *Ibid.* His critique was directed more broadly at the proportionality test for its lack of an objective *tertium comparationis*.

¹²⁰² ECtHR, *Ireland v. UK*, para. 167. Naturally, this finding of the Court was widely criticised, see for example Martin Robertson and Amnesty International, *Torture in the Eighties: An Amnesty International Report* (London: Amnesty International Publications, 1984).

¹²⁰³ *Ibid.*

¹²⁰⁴ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 518. They also pointed to the contrasting outcomes of factually similar cases like ECtHR, *Tyrer v. UK*, and ECtHR, *Costello-Roberts v. UK*, App. No. 13134/87, Judgment of 25 March 1993.

¹²⁰⁵ ECtHR, *Klass v. Germany*, App. No. 5029/71, Judgment of 6 September 1978.

¹²⁰⁶ ECtHR, *Tomasi v. France*, App. No. 12850/87, Judgment of 27 August 1992.

¹²⁰⁷ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 524.

¹²⁰⁸ Waldron, *Torture, Terror, and Trade-Offs*, 316.

¹²⁰⁹ *Ibid.*

¹²¹⁰ Lehto, “Applicability of Article 3”, 58–59.

misconception, as the Court is carrying out a relativity exercise, which does not qualify the right, hence it does not undermine its absolute nature.¹²¹¹ Similarly, Smet also argued that assessing this relative threshold is a matter of contextualisation and not balancing, which does not necessarily crack the absolute armour of Article 3,¹²¹² and there are others who also contended that the relativity in the application of Article 3 does not affect its absolute nature.¹²¹³

It would be remiss not to mention one of the most recent advisory opinions of the ECtHR, requested by the Armenian Cassation Court, concerning the applicability of statutes of limitation to the prosecution, conviction and punishment of acts of torture. It was connected to the case where the applicant had been tortured while in custody, but Armenian authorities failed to conduct an effective investigation, which is why the ECtHR found violation of Article 3 at the time.¹²¹⁴ The issue arose when the Armenian court reopened the case but exempted perpetrators from criminal responsibility due to the application of limitation periods.¹²¹⁵

After recalling that it has accepted that the prohibition of torture has achieved the status of *jus cogens*,¹²¹⁶ the Court emphasised that “the procedural obligations arising under (Article 2 and) Article 3 could hardly be considered to have been met where an investigation was terminated through statutory limitation of criminal liability resulting from the authorities’ inactivity”¹²¹⁷

Peculiarly, the ECtHR further stated that “it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 of the Convention at the expense of the guarantees of Article 7 of the Convention, one of which is that the criminal law must not be construed extensively to an accused’s detriment”.¹²¹⁸ As a reminder, Article 7 of the ECHR is also a non-derogable right, often (doctrinally) considered to be absolute.¹²¹⁹ Yet it seems that the Court has explicitly afforded priority to Article 3 in the case of potential conflict between the positive obligations under one absolute right and the negative obligation under another.

Reminding of its case-law, in which it determined that legislative amendments extending a limitation period that has not yet expired do not contravene Article 7,¹²²⁰ and that Article 7 would only preclude the revival of a prosecution where no valid legal basis

¹²¹¹ Palmer, “A Wrong Turning”, 439.

¹²¹² Smet, “The ‘Absolute’ Prohibition of Torture”, 278, 280. He offered several illustrative examples of how this relative threshold should be approached in order to respect absolute nature of the prohibition, see *ibid*, 5-7.

¹²¹³ Natasa Mavronicola and Francesco Messina, “Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*”, *The Modern Law Review* 76, no. 3 (2013): 592-594.

¹²¹⁴ ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, Req. No. P16-2021-001, Advisory Opinion of 26 April 2022, para. 11.

¹²¹⁵ *Ibid*, paras. 12-21.

¹²¹⁶ *Ibid*, para. 59.

¹²¹⁷ *Ibid*, para. 60.

¹²¹⁸ *Ibid*, para. 65.

¹²¹⁹ See down below in this chapter.

¹²²⁰ ECtHR, *Advisory Opinion on the applicability of statutes of limitation*, para. 75.

exists, such as when a limitation period has already expired,¹²²¹ the Court concluded that it is for national courts to determine “whether rules of international law having legal force in the national legal system”¹²²² represent “a sufficiently clear and foreseeable legal basis within the meaning of Article 7 of the Convention to conclude that the criminal offence in question is not subject to a statute of limitation”¹²²³.

However, in the Concurring Opinion of Judge Harutyunyan the Court was rightly criticised for failing to adopt a clear position “either on the issue of whether limitation periods for the crime of inflicting torture, degrading or inhuman treatment fall within the scope of Article 3 or Article 7 of the Convention, or on the issue of whether Article 3 should be understood as an absolute prohibition immune to any limitation periods”¹²²⁴. Judge Harutyunyan underlined that a state’s obligations to prevent, investigate and punish perpetrators of grave human rights and international humanitarian law violations are obligations of result rather than of conduct, given their *jus cogens* status in international law and their function in safeguarding fundamental human rights.¹²²⁵ Otherwise, this would lead to a situation of “legitimised impunity”.¹²²⁶ For him:

“The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of result, endowed with a necessarily objective character. In the international human rights law framework, it is not the result that is conditioned by the conduct of the State, but, quite the contrary, it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms for the protection of the human being. The conduct of the State ought to be that which is conducive to compliance with the obligations of result.”¹²²⁷

Finally, he warned against forgetting that “the absolute prohibition of torture has resulted from increased awareness of the horror and the inhumanity of the practice of torture”¹²²⁸.

When it comes the notion of absoluteness, Judge Harutyunyan offered his point of view, interpreting the Court’s case-law as indicating that “the philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests”¹²²⁹. Importantly, he explained that, unlike many of the other ECHR articles, the usual two-step test where the Court first checks for interference and then assesses if it was justified, cannot be applied to Article 3.¹²³⁰ Instead, the only relevant question is whether the ill-treatment reaches a certain level of seriousness

¹²²¹ *Ibid*, para. 77.

¹²²² *Ibid*, para. 78.

¹²²³ *Ibid*.

¹²²⁴ ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, Concurring Opinion of Judge Harutyunyan, part III (A).

¹²²⁵ *Ibid*, part IV (A) para 3.

¹²²⁶ *Ibid*.

¹²²⁷ *Ibid*.

¹²²⁸ *Ibid*.

¹²²⁹ *Ibid*, part IV (B), para. 1.

¹²³⁰ *Ibid*.

and if it does, then Article 3 applies, and once it does, it is absolutely prohibited, there is no justifications allowed and no form of balancing or proportionality comes into play.¹²³¹

As regards the central matter of the opinion, he took a view that “the *jus cogens* prohibition of torture overrides national provisions on limitation. As a consequence of the negative effect of the *jus cogens* nature of the prohibition, any law providing for a limitation period is therefore, *ab initio*, contrary to international norms and could never be legally applied”.¹²³² Even though this approach is rather limiting on state’s margin of appreciation, it does go in line with both the status of the prohibition in international law and its fundamental importance that the Court so often puts affront. Judge Harutyunyan concluded that there is “no question of the applicability of Article 7 of the Convention as there was never a valid law that provided for limitation; the non-applicability of limitation periods was legal *ab initio* and foreseeable as having been part of national legislation pursuant to the *jus cogens* prohibition of torture and limitation statutes in relation thereto.”¹²³³

In sum, Judge Harutyunyan’s insistence on a more coherent approach is compelling, particularly his argument that the absolute nature of Article 3 entails an obligation of result, immune to any (statute of) limitation, which may be seen as rooted in a vision of international human rights law as a legal order committed to the non-negotiable protection of human dignity. However, the opinion does raise a number of difficult questions, such as whether the obligations of result really flow from the *jus cogens* character of the prohibition, given that such a consequence is nowhere formally recognised. Still, he made an important intervention, especially in recognizing that at the heart of the matter is not a conflict of rights, as Article 7 is not invoked due to the non-applicability of statutes of limitation, which was foreseeable. If nothing else, it challenged the Court to confront the constraints of its current interpretive strategy and to offer a much-needed clarification of the legal consequences of *jus cogens* norms.

Finally, while commenting on the Advisory Opinion, Arnold Vardanyan perceived it as a contribution to the formation of international consensus against allowing limitation statutes for torture-related crimes but concluded that further development is needed to ensure that the punishment of perpetrators reflects the truly absolute nature of the prohibition.¹²³⁴

There is another point here that merits attention, regarding the difference between this and other rights. Some scholars have raised the issue of the hypocrisy in claiming that the ECHR allows certain exceptions to the right to life, but none to the right not to be subjected to ill-treatment.¹²³⁵ Specifically, the question is why is it considered acceptable to shoot and kill a person to achieve a more important aim, while it is never permissible to subject a person to an ill-treatment.¹²³⁶ However, this dilemma is somewhat misleading, as it is

¹²³¹ *Ibid.*

¹²³² *Ibid.*, part IV (E), para. 2.

¹²³³ *Ibid.*

¹²³⁴ Arnold Vardanyan, “Whether “Absolute” Means Absolute: Following the ECtHR Advisory Opinion on the Applicability of Statutes of Limitation to the Prosecution, Conviction and Punishment of Torture”, *Völkerrechtsblog*, 23 April 2024, available at <https://voelkerrechtsblog.org/whether-absolute-means-absolute/> (accessed 1.5.2025).

¹²³⁵ Steven Greer, “Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law? A Reply to Graffin and Mavronicola”, *Human Rights Law Review* 18, No. 2 (2018): 300.

¹²³⁶ *Ibid.*

conceivable that state authorities might shoot a person when it is necessary and represents the least severe measure to prevent some greater harm and that such shooting would not be qualified as inhuman or degrading treatment.¹²³⁷ Likewise, high-security measures whose aim is solely to prevent harm to others and which respect the dignity of the person involved are most likely going to comply with Article 3.¹²³⁸ This “relativism” in applying Article 3 does not necessarily contradict its absolute nature, but forms part of a reasonable interpretation and application that take into account the agency of the individual and their dignity.¹²³⁹

However, there are certain particularly problematic cases that have sparked a lot of debate in the literature. For instance, Smet remarked that the ECtHR used proportionality language in force-feeding cases where state authorities applied it in order to avoid death by hunger strike of detainees.¹²⁴⁰ Instead of trying to justify these measures by qualifying them as “therapeutic”, “medically necessary” or “aimed at saving the life”, Smet suggested that the Court should have only assessed them based on whether they meet the threshold of Article 3 or not.¹²⁴¹ He was very critical of the Court’s line of reasoning and pointed out that such negligent selection of language that resembles undertaking the proportionality assessment may undermine the right’s absolute character.¹²⁴² Nevertheless, Mavronicola stood firm in the face of such critique, shielding her stance on absoluteness by emphasizing that even this (rather inadequate) thought process of the ECtHR can be understood as specification, *i.e.*, the analysis of whether the conduct at hand surpasses the Article 3 “threshold” and should be regarded as ill-treatment.¹²⁴³ Her point is valid, and one swallow does truly not make a summer, hence a group of cases in which the Court has opted for inapt formulations, that are incompatible with the very nature of the absolute right, will not undermine the account for absoluteness. However, such clumsy arguments and deliberation ought not to go unremarked. The Court should be reminded that a greater heed is necessary in the future when articulating its judgments, especially with regard to absolute rights, so as not to introduce further confusion into concepts that are already vague and regrettably, partly due to its own restraint, still unresolved.

To conclude, the tendency to infer or assume the absolute nature of the prohibition under Article 3 without properly establishing it was rightly criticised, as this approach can lead to uncertainty.

Marloes Susanna Bulthuis was among scholars who insisted that the ECtHR should define what it means for a right to be absolute.¹²⁴⁴ Whether Article 3 is absolute or not depends on the definition of absoluteness, hence if it is understood in accordance with “the

¹²³⁷ Mavronicola and Messineo, “Relatively Absolute?”, 594.

¹²³⁸ *Ibid.*

¹²³⁹ *Ibid.*

¹²⁴⁰ Smet, “The ‘Absolute’ Prohibition of Torture”, 283-284.

¹²⁴¹ *Ibid.*, 283. See for instance ECtHR, *Ciorap v. Moldova*, App. No. 12066/02, Judgment of 19 June 2007, para. 77; ECtHR, *Nevmerzhitsky v. Ukraine*, App. No. 54825/00, Judgment of 5 April 2005, para. 94; ECtHR, *Herczegfalvy v. Austria*, App. No. 10533/83, Judgment of 24 September 1992, para. 82.

¹²⁴² Smet, “The ‘Absolute’ Prohibition of Torture”, 281.

¹²⁴³ Mavronicola, *Torture, Inhumanity and Degradation under Article 3*, 111-112.

¹²⁴⁴ Marloes Susanna Bulthuis, *The Illusion of Absoluteness? - Theory and Practice of the Absolute Prohibition of Torture, Inhuman or Degrading Treatment or Punishment under the European Convention of Human Rights* (Master Thesis, University of Luxembourg, 2018), 6.2.

strict absoluteness theorem”, which holds that an absolute right can never, under any circumstances, allow for any considerations of legitimacy or proportionality, this author assessed that then it is not.¹²⁴⁵ However, this view is rejected for the risk of making the prohibition “an artificial one”.¹²⁴⁶ On the other hand, according to the “broad absoluteness theorem”, a right is absolute only when the threshold of application has been trespassed, thus, it allows for legitimacy and balancing in the process of contextualisation, but it still cannot solve the conundrum of conflict of rights.¹²⁴⁷ However, it is unclear how the application of the right would be determined under the first theorem, hence this distinction, although well-intended, remains of little practical value. In any case, Bulthuis concluded that only negative obligations can be considered absolute, since they always prevail over positive obligations.¹²⁴⁸ For these reasons, Bulthuis proposed that the Court should accept the following definition of an absolute right: “a negative right or obligation which does not allow for any consequentialist considerations after the threshold of application has been attained, while, at the same time accepting, that principles of legitimacy, proportionality and balancing are inherent in the process of contextualisation and the concepts of punishment and the use of force”.¹²⁴⁹

In any case, although Article 3 is widely regarded as absolute due to its exclusion of limitations and derogations and the special weight accorded to it by the ECHR bodies, its exact contours remain ambiguous.¹²⁵⁰ Addo and Grief have also maintained that there must be more to an “absolute” right than just the absence of exceptions.¹²⁵¹ Moreover, its use in practice frequently relies on context-specific and subjective judgments, making it an imprecise and vague concept.¹²⁵² They nevertheless concluded that “absolute right is a term of art which is by nature imprecise and its evaluation can best be understood only in the particular context”.¹²⁵³ Given this context-sensitive nature of its application, Article 3 may seem to be inconsistently applied across cases, but this does not necessarily imply that the Strasbourg bodies fail to maintain its absolute character.¹²⁵⁴

Even though some of these positions blur the line between what the Court actually says and what the authors believe it should say, this blend of analysis still yields a valuable insight. Absolute rights, especially Article 3, are context-sensitive and imprecise, yet they remain firmly upheld in the Strasbourg case law. Moreover, several points are also clear - the ECHR undoubtedly recognises absolute rights, the prohibition of torture is an absolute right, and the Court understands absolute rights as those allowing for no exceptions.

¹²⁴⁵ *Ibid*, para. 6.2.1.

¹²⁴⁶ *Ibid*.

¹²⁴⁷ *Ibid*, para. 6.1. 2.

¹²⁴⁸ *Ibid*.

¹²⁴⁹ *Ibid*, para. 6.3.2.

¹²⁵⁰ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 523.

¹²⁵¹ *Ibid*.

¹²⁵² *Ibid*.

¹²⁵³ *Ibid*.

¹²⁵⁴ *Ibid*.

3.2. The Prohibition of Ill-Treatment under the ICCPR – A Universal Commitment to Absoluteness

The ICCPR provides in its Article 7 that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

The provision cannot be subjected to derogation, as confirmed by Article 4 of the ICCPR.

Even though it is framed in absolute, unqualified terms, similar to those in the ECHR, what is immediately noticeable as a key difference is the inclusion of the term “cruel” in the ICCPR,¹²⁵⁵ and the explicit prohibition of medical and scientific experimentation. The ICCPR’s monitoring body, the HRC, particularly underlined that “special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment”.¹²⁵⁶

The HRC’s explanation given in General Comment No. 20 reflected the absolute nature of the prohibition, stating that “the text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority”.¹²⁵⁷ Although the word “absolute” was not explicitly used as a descriptor, it seems as if the HRC appeared to capture its essence in this paragraph, insisting on no restrictions being permitted and no justification for infringement being acceptable.

In its jurisprudence, the HRC has tackled the scope of Article 7, for instance in *Vuolanne v. Finland*, where the Committee clarified, similar to the reasoning of the ECtHR, that “what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.¹²⁵⁸ Likewise, the Committee did not draw clear distinctions between various forms of

¹²⁵⁵ Evans and Morgan noted that in the *travaux préparatoires* there was no debate on the significance of the particular term, nor why the drafters have chosen these exact terms for different types of ill-treatment. See Evans, Morgan, 1998, 72. On the other hand, Hartman interpreted this as if the ICCPR grants broader protection than the ECHR, as it additionally includes “cruel treatment”, Joan F. Hartman, “Derogation from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations”, *Harvard International Law Journal* 22, No. 1 (1981): 15.

¹²⁵⁶ HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 7.

¹²⁵⁷ *Ibid*, para. 3.

¹²⁵⁸ *Ibid*, para. 9.2

prohibited treatment,¹²⁵⁹ but it did acknowledge the hierarchy among them, with the exact qualification depending on “nature, purpose and severity of the treatment applied”.¹²⁶⁰

Interestingly enough, the ECtHR has also explicitly found that the absolute prohibition of torture, inhuman or degrading treatment or punishment is a generally recognised international standard, accepted not only in the ECHR, but also the ICCPR and the ACHR.¹²⁶¹

For the context of the UN system, it is also worth mentioning that there are other UN bodies that referred to the prohibition as an absolute one.

First of all, the UNCAT uses unambiguous language, in stating that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”¹²⁶², qualifying the prohibition as non-derogable. Tamar Meisels interpreted this provision as excluding any kind of justificatory institutes, including necessity defence.¹²⁶³ For Neuman, this provision is “the most explicit indication of absoluteness”.¹²⁶⁴ Unlike the ICCPR, the ECHR, or the ACHR, the Convention attempts to define torture, outlining it as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” and specifying that “it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.¹²⁶⁵

Albeit the UNCAT applies only to acts related to a public official or other person acting in official capacity, the HRC has rejected such a narrow approach. It recognised the horizontal effects of the provision, encompassing also conduct of private individuals, which has been praised by some scholars,¹²⁶⁶ and condemned by others, who argued that any kind of overextending the concept may dilute its universal condemnation and diminish its

¹²⁵⁹ HRC, *CCPR General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)*, 30 May 1982, para. 2. This was criticised, for instance, by John Parry, who argued that failing to differentiate between torture, cruel, inhuman or degrading treatment and punishment is risky, as state authorities might exploit this ambiguity and allow unacceptable forms of interrogation, interpreting that only torture is non-derogable, while other forms of ill-treatment are not, John Parry, “Pain, Interrogation, and the Body: State Violence and the Law of Torture”, in *Evil, Law and the State: Perspectives on State Power and Violence*, ed. John T. Parry (Rodopi, 2006), 8. However, this objection seems redundant, as nothing in the ICCPR suggests that only some forms of ill-treatment are non-derogable and others are not.

¹²⁶⁰ HRC, *CCPR General Comment No. 20*, para. 4.

¹²⁶¹ ECHR, *Soering v. UK*, para. 88.

¹²⁶² Article 2, para. 2 of UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984.

¹²⁶³ Tamar Meisels, “Torture and the Problem of Dirty Hands”, *Canadian Journal of Law and Jurisprudence* 21, (2008): 168.

¹²⁶⁴ Neuman, “Constrained Derogation in Positive Human Rights Regimes”, 19.

¹²⁶⁵ Article 1, para. 1. of UNCAT.

¹²⁶⁶ Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (N. P. Engel, 2005), 161. See also HRC, *CCPR General Comment No. 20*, para. 2.

shocking character¹²⁶⁷. Surely, there is little doubt in that vague legal prohibitions can create confusion for those they are meant to govern, particularly regarding their understanding of what is expected of them to do and what to avoid doing.¹²⁶⁸ Yet, while legal certainty is undeniably one of the most important principles that should be achieved as much as possible, the evolving extension of the prohibition beyond state actors should not be immediately dismissed and criticised as it holds value in broadening and reinforcing the protection.

UN Special Rapporteurs also confirmed the absolute status of the prohibition. Nigel Rodley recommended that “particular stress should be placed upon the principle that the prohibition of torture is absolute and non-derogable”,¹²⁶⁹ and that resorting to any form of ill-treatment would be a violation of an “absolute and peremptory rule of international law”¹²⁷⁰. Manfred Nowak noted that “the prohibition of torture is one of the few absolute and non-derogable human rights, a standing shared only with the prohibition of slavery, slave trade, servitude, and the retroactive application of criminal law”.¹²⁷¹ He also explicitly described Article 7 of the ICCPR as of absolute nature.¹²⁷² Most importantly, Nowak explained that “the absolute nature of the prohibition of torture means that the right to personal integrity and dignity — the freedom from torture — cannot be balanced against any other right or concern. As such, the prohibition of torture goes further than the protection of the right to life which may be balanced, such as in the case of the lawful killing of a hostage-taker in order to rescue his hostages. Torture must not be balanced against national security interests or even the protection of other human rights. No limitations are permitted on the prohibition of torture”.¹²⁷³ He also paid special heed to its non-derogable character.¹²⁷⁴ In the end, Nowak warned states against “the deliberate undermining of the absolute prohibition”.¹²⁷⁵

Judge Cançado Trindade also took a view that torture is absolutely prohibited in all its forms.¹²⁷⁶ Curiously, Judge praised the ICJ’s assertion that “the absolute prohibition of torture is one of *jus cogens*”, even though the Court did not use the term “absolute” in this context.¹²⁷⁷ At the same time, Judge criticised the Court for failing to apply appropriate legal consequences that should follow from such a designation.¹²⁷⁸ According to him, those consequences are, for instance, that the state obligations should be regarded as obligations

¹²⁶⁷ Marcy Strauss, “Torture”, *New York Law School Law Review* 48, No. 1 (2004): 215.

¹²⁶⁸ Waldron, *Torture, Terror, and Trade-Offs*, 202.

¹²⁶⁹ Economic and Social Council, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2001/62*, E/CN.4/2002/76, 27 December 2001, 8.

¹²⁷⁰ *Ibid*, 14.

¹²⁷¹ UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Manfred Nowak*, A/HRC/13/39/Add.5, 5 February 2010, para. 44.

¹²⁷² *Ibid*.

¹²⁷³ *Ibid*, para. 41.

¹²⁷⁴ *Ibid*, para. 42.

¹²⁷⁵ *Ibid*, para. 254.

¹²⁷⁶ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, I.C.J. Reports 2012, Separate Opinion of Judge Cançado Trindade, para. 83.

¹²⁷⁷ *Ibid*, para. 4, see also para. 158.

¹²⁷⁸ *Ibid*, para. 4.

of result and not of conduct,¹²⁷⁹ as otherwise “the doors would be left open to impunity”.¹²⁸⁰ To cite him on the matter, “the absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of result, endowed with a necessarily objective character, and the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights, encompassing the origin as well as the implementation of State responsibility, with the consequent and indispensable duty of reparation”¹²⁸¹.

For the sake of clarity, only the negative obligation arising from the prohibition of torture, namely the obligation not to subject anyone to ill-treatment, can be regarded as an obligation of result, as it imposes a legal requirement to achieve a specific end. In contrast, positive obligations could hardly be qualified as anything other than an obligation of conduct, since they require states to take certain steps or adopt some measures, but they do not guarantee a particular outcome. For instance, there is a duty for a state to carry out a due investigation, but not necessarily to convict anyone.¹²⁸² Yet, Judge Cançado Trindade would probably not assign to this conclusion, as in one of his other Separate Opinions, he took a stance that an international juridical system of absolute prohibition of all forms of torture generate “an aggravated international responsibility”, which entails, among others, the obligation for a state “to render justice in its domestic law, investigating the facts and punishing those responsible”¹²⁸³.

He concluded by stating that “jurisprudence of distinct international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances, a prohibition that, in our days, falls under international *jus cogens*, with all its juridical consequences for the States responsible. In rightly doing so, it has remained attentive to the underlying fundamental human values that have inspired and guided it. This is a development which cannot be overlooked, and is to continue, in our days”.¹²⁸⁴

Finally, this separate opinion presents a robust affirmation of the fact that “torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition”.¹²⁸⁵

Based on such proclamations of the ICJ, among other indicators found in both practice and doctrine, the Special Rapporteur of the International Law Commission (hereinafter: ILC) also placed the prohibition of torture in the illustrative list of norms recognised as having attained *jus cogens* status.¹²⁸⁶

¹²⁷⁹ *Ibid*, para. 44.

¹²⁸⁰ *Ibid*, para. 45.

¹²⁸¹ *Ibid*, para. 49.

¹²⁸² This is in accordance with the above cited standard of the ECtHR from the case *Sabalić v. Croatia*, para. 97.

¹²⁸³ IACtHR, *Brothers Gómez Paquiyauri v. Peru*, Judgment of 8 July 2004, Separate Opinion of Judge Cançado Trindade, paras. 37-38.

¹²⁸⁴ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Separate Opinion of Judge Cançado Trindade, para. 103.

¹²⁸⁵ *Ibid*, para. 182.

¹²⁸⁶ United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, Special Rapporteur, A/CN.4/727, 31 January 2019, para. 77.

After all, one should not overlook the important point that Waldron made, which is that despite the claims of relativists, almost every country of our world has signed, and most have ratified, the ICCPR, reflecting a universal condemnation of practices that violate human dignity, regardless of whether they have done so for opportunistic or hypocritical reasons.¹²⁸⁷

3.3. The Prohibition of Ill-Treatment within the ACHR System – Not Only Absolute but Also *Jus Cogens*

Article 5 of the ACHR, titled the “Right to Humane Treatment”, unequivocally states in its paragraph 2 that “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment” and this prohibition is not subject to derogations, as confirmed by Article 27, paragraph 2. of the Convention. Apparently, the ACHR adopted the ICCPR’s inclusion of “cruel” treatment, but unlike the ICCPR, it makes no reference to medical or scientific experimentation.

The IACtHR has interpreted this provision in absolute terms multiple times, stating, for instance, that “the prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such a war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency”¹²⁸⁸. What is more, it explained that “the prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such a war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency”¹²⁸⁹. This stance that all forms of torture, including the psychological, has entered the realm of international *jus cogens*, was firmly supported by Judge Cançado Trindade in his Concurring Opinion.¹²⁹⁰ He viewed “the categorical and absolute prohibition of torture under any circumstance, which falls within the sphere of international *jus cogens*”, to be “a definitive conquest of civilisation”¹²⁹¹ and explained that both “the absolute prohibition of torture” and “international *jus cogens*”, “arises from the supreme *material* source of law, the *universal juridical conscience*”.¹²⁹² For him, “there is no alternative to this juridical development motivated by the human conscience; if this were not so, we would return to barbarism”.¹²⁹³

All these stances were confirmed by the Court in its later judgments, reiterating that the “prohibition of torture is absolute and non-revocable, even under the most difficult

¹²⁸⁷ Waldron, *Torture, Terror, and Trade-Offs*, 316.

¹²⁸⁸ IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, para. 89. Same stance was taken in IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004, para. 143.

¹²⁸⁹ *Ibid*, para. 92.

¹²⁹⁰ IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, Concurring Opinion of Judge Cançado Trindade, para. 1.

¹²⁹¹ *Ibid*, para. 6.

¹²⁹² *Ibid*, para. 8.

¹²⁹³ *Ibid*, para. 12.

circumstances”¹²⁹⁴ and that “an international juridical system of absolute prohibition of all forms of torture, both physical and psychological, has been established, and it is today part of the sphere of international *jus cogens*”¹²⁹⁵. In one of the cases that concerned forced disappearance, the Court held that both the prohibition of torture and forced disappearance are “non-derogable provisions of international law (*jus cogens*)”,¹²⁹⁶ treating those terms in a way as synonyms. In any case, it explained that “these offenses are included among the conducts deemed to harm essential values and rights of the international community and entail the activation of national and international measures, instruments and mechanisms to ensure their effective prosecution and the sanction of the authors, so as to prevent them and avoid them remaining unpunished”.¹²⁹⁷ In one of its Advisory Opinions, the Court confirmed that “Article 5 of the American Convention expressly recognises the right to personal integrity, the legal protection of which has the main purpose of the absolute and peremptory prohibition contained in customary international law of torture and cruel, inhuman or degrading treatment or punishment”.¹²⁹⁸

The Court relied directly on the ECtHR, citing its position that certain acts that were previously qualified as inhuman or degrading treatment may be classified differently in the future,¹²⁹⁹ hence it may be inferred that this subjective or relative assessment is a universal standard within international human right law. What may not be so universal, however, is whether the same treatment would be classified in the same way by all of the aforementioned human rights bodies.

In a more recent case, the Court confirmed that:

“Article 5(2) establishes, specifically, the absolute prohibition to subject someone to torture or to cruel, inhuman or degrading treatment or punishment. The Court understands that any violation of Article 5(2) of the American Convention necessarily involves the violation of Article 5(1) thereof. The violation of the right to physical and mental integrity has diverse manifestations that range from torture to other types of ill-treatment or cruel, inhuman or degrading treatment, the physical and mental aftereffects of which vary in intensity based on endogenous and exogenous factors (duration of the treatment, age, sex, health, context and vulnerability, among others), which must be analysed in each specific situation”.¹³⁰⁰

Therefore, it is obvious that the Court also accepted a hierarchical structure of ill-treatment forms, aligning itself completely with the reasoning of the other human rights monitoring bodies.

To sum up, the Inter-American system of human rights has developed a strong and consistent jurisprudence affirming the absolute nature of the prohibition of torture. Judge Cançado Trindade’s linking of it to the universal juridical conscience represents an

¹²⁹⁴ IACtHR, *Brothers Gómez Paquiyauri v. Peru*, para. 111.

¹²⁹⁵ *Ibid.*, para. 112. The same description can be found in, for instance, IACtHR, *Baldeón García v. Peru*, Judgment of 6 April 2006, para. 117.

¹²⁹⁶ IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para 128. This was the first time that the Court qualified the prohibition of forced disappearance as a *jus cogens* norm.

¹²⁹⁷ *Ibid.*

¹²⁹⁸ IACtHR, Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”, OC-21/14, 19 August 2014, para. 224.

¹²⁹⁹ IACtHR, *Cantoral-Benavides v. Peru*, Judgment of 18 August 2000, para. 99.

¹³⁰⁰ IACtHR, *Girón and Gómez v. Guatemala*, para. 78.

endeavour to offer deeper normative foundations of this prohibition, which should be praised. The Court left little doubt in that the prohibition itself admits no exceptions and its case-law certainly contributed to the global affirmation that this legal and moral abomination is absolutely prohibited.

Finally, even though African Charter does not include a derogation clause and therefore does not qualify any rights as non-derogable, it is worth mentioning at this place that even the African Commission has held that the prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute.¹³⁰¹ Unfortunately, apart from this declaratory statement, no explanation was offered.

4. *Non-Refoulement*

"No one leaves home unless home is the mouth of a shark."

– Warsan Shire (*Home*, 2011)

Taking into account that the ECHR does not grant the right to asylum, and that it only prohibits expulsion of a state's own nationals and collective expulsion of aliens, as set out in Articles 3 and 4 of the Protocol No. 4 to the ECHR, it does not come as a surprise that the Court recognised the necessity to apply evolutive (and arguably teleological) interpretation to derive the prohibition of transferring or returning individuals to states where there are substantial grounds for believing that they would be at risk of irreparable harm, such as ill-treatment.

According to Lehto, it is from the absolute character of Article 3 that the ECtHR has inferred the prohibition on *refoulement*, or the principle of *non-refoulement*, borrowed from the international refugee law, which prohibits expulsion or extradition of individuals to a country where they would face a risk of ill-treatment as defined under Article 3 of the ECHR.¹³⁰²

Wouters affirmed that international human rights law regards the principle of *non-refoulement* as absolute, since its aim is to prevent serious human rights violations, allowing no exceptions on grounds such as that a person is a criminal or he or she represents a concern for public order, health, moral or national security, unlike in international refugee law, where it is not treated as absolute, due to Article 33, paragraph 2 of the UN Convention Relating to the Status of Refugees allowing exceptions if a refugee is considered to be a threat to national security or has been convicted of a particularly serious crime and poses a danger to the host country's community.¹³⁰³

¹³⁰¹ African Commission on Human and People's Rights, *Huri-Laws v. Nigeria*, Comm. No. 225/98, Decision of 6 November 2000.

¹³⁰² Lehto, "Applicability of Article 3", 56.

¹³⁰³ Wouters, "International refugee and human rights law", 239. See also Article 33 of the UN General Assembly, 1951 *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951.

According to Mavronicola, this principle reflects the idea that states must not place people in situations, where their exposure to torture or inhuman or degrading treatment would be heightened.¹³⁰⁴

Namely, the *Soering* judgment is often taken as an authority for the view that:

“[i]t 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, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed”.¹³⁰⁵

It maintained that “extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article”.¹³⁰⁶ The Court specified that this inherent obligation not to extradite also covers situations where the fugitive would be face, in the receiving State, a real risk of being subject to inhuman or degrading treatment or punishment prohibited by that Article.¹³⁰⁷

In the instant case, the applicant was a German national facing removal under extradition procedures from the UK to the US, where, if convicted for the offence he was charged with, he risked being sentenced to death and subjected to the so-called “death row phenomenon” - prolonged delays under harsh conditions before execution.¹³⁰⁸ The applicant argued that extradition would expose him to inhuman and degrading treatment, contrary to Article 3.¹³⁰⁹ The conclusion was that “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”.¹³¹⁰

Nonetheless, the Court’s reasoning did not escape criticism. For instance, Dembour was not far from the truth in observing that, to the consternation of many commentators, the Court appeared to shift away from absolutism and towards the relativism of consequentialism when it declared that “what amounts to ‘inhuman or degrading treatment or punishment’ depends on all the circumstances of the case”,¹³¹¹ thereby suggesting that balancing of general interest against individual’s rights is inherent to the entire ECHR.¹³¹² Similarly, Lehto also took a view that the absolute nature of Article 3 was obviously not an obstacle to some form of balancing, evident in the Court’s “search of a fair balance between demands of the general interest of the community and the requirements of the protection of

¹³⁰⁴ Natasa Mavronicola, “Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer”, *Human Rights Law Review* (2017): 18.

¹³⁰⁵ ECtHR, *Soering v. UK*, para. 88.

¹³⁰⁶ *Ibid.*

¹³⁰⁷ *Ibid.*

¹³⁰⁸ *Ibid.*, para. 111.

¹³⁰⁹ *Ibid.*, para. 80.

¹³¹⁰ *Ibid.*, para. 111.

¹³¹¹ *Ibid.*, para. 89.

¹³¹² Dembour, *Who Believes in Human Rights?*, 86.

the individual's fundamental rights"¹³¹³, which was even amplified by the Court's considerations of the benefits associated with the aims of extradition.¹³¹⁴ However, Lehto also acknowledged that there can be a fine line between balancing and interpretation, as interpretation depends on many considerations.¹³¹⁵ Ultimately, the conclusion was that the ECtHR resorted to balancing in Article 3 cases, despite its "rhetoric of fundamental and absolute rights".¹³¹⁶

It is said that the Court could have framed its judgment in absolute terms by aligning with the UNCAT, which prohibits extradition where substantial grounds exist for believing a person would face a risk of torture, and could have extended this absolute negative obligation to include inhuman and degrading treatment as well.¹³¹⁷ Instead, it opted for weighing various factors, such as the applicant's age and mental state or the average length of detention prior to execution.¹³¹⁸

As was already indicated, this kind of balancing often served as a solid basis for a broader critique of the Court's overall approach regarding Article 3. Namely, there appears to be a two-step analysis, with each step addressing one of the two questions: (1) how a right is defined, and (2) what priority that right holds over other considerations. Even if rights are given strong protection at the second stage, such as the absolute priority, balancing can still play a role in the first stage, when determining the scope of the rights, *i.e.*, what the right includes. Thus, balancing does not necessarily have to be incompatible with perceiving rights as absolute, it just influences how rights are initially shaped. In the case of Article 3, it would mean that the Court has a broad manoeuvre space for (implicit) balancing when making the first step, when it deliberates whether the act in question even falls within the scope of Article 3, and secondly, when it decides whether to qualify it as torture or some less severe form of inhuman treatment. In other words, it is conceivable that the Court circumvents the absolute nature of this right without formally or nominally undermining it, simply by choosing not to classify certain conduct as sufficiently serious to be protected under Article 3, and by doing so not solely on the basis of the severity of the caused suffering, but also by weighing it against another conflicting right or interest. Nevertheless, this process of balancing is undoubtedly part of the interpretation, which is an integral and indispensable process imminent to the application of rights, that does not necessarily undermine the absoluteness of the right.

In any event, the *Soering* judgment marked a transformative moment by establishing that conduct occurring outside the jurisdiction of a state could nonetheless be attributed to that state, provided it is shown to have been instrumental in enabling the rights violation to occur.¹³¹⁹

Another important case in this field is *Chahal v. UK*, where the ECtHR held that the UK's attempt to deport the applicant, a Sikh separatist, to India where he faced a real risk of

¹³¹³ ECtHR, *Soering v. UK*, para. 89.

¹³¹⁴ Lehto, "Applicability of Article 3", 68. An example is reasoning in the ECtHR's case *Babar Ahmad and Others v. UK*, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 24 September 2012, that will be discussed further in this chapter.

¹³¹⁵ Lehto, "Applicability of Article 3", 69.

¹³¹⁶ *Ibid*, 73.

¹³¹⁷ Dembour, *Who Believes in Human Rights?*, 86.

¹³¹⁸ ECtHR, *Soering v. UK*, paras. 105-110.

¹³¹⁹ Dembour, *Who Believes in Human Rights?*, 86.

torture or ill-treatment, would violate Article 3 and ruled that no balancing of interests was permitted under Article 3.¹³²⁰

When it comes to the absoluteness of the right guaranteed under Article 3, the Commission was of the opinion that the guarantees afforded by Article 3 were “absolute in character, admitting of no exception”¹³²¹. The Court firstly explained that this Article “enshrines one of the most fundamental values of democratic society”, and despite being well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence, ECHR prohibits in absolute terms torture or inhuman or degrading treatment or punishment, even in these circumstances and irrespective of the victim’s conduct.¹³²² Notably, the Court went on to explain, in what may be the rare clarification of its approach to absoluteness, that “unlike most of the substantive clauses of the ECHR, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation”.¹³²³

Moreover, it elucidated that “the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases”, hence, “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion”.¹³²⁴

Finally, Addo and Grief found that the Court’s stance that “examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe”¹³²⁵ aligns with Gewirth’s analysis, according to which an absolute right or absolute prohibition generally possesses certain conceptual features, so besides allowing no exceptions, limitations or derogations, it is expected to be protected as rigorously as possible.¹³²⁶ On the other hand, Hemme Battjes found this very reasoning to be circular, as it claims that Article 3 does not allow for limitations or derogations since it is fundamentally important, while this fundamental importance follows from the absence of a limitation clause.¹³²⁷

Addo and Grief still praised this elaboration offered by the ECtHR, claiming that such a feature adds depth and substance to the “skeletal definition” of absoluteness, usually employed by the Commission and the Court, which rests solely on lack of exceptions and the prohibition of derogation.¹³²⁸ It was further stressed that an absolute right cannot be

¹³²⁰ ECtHR, *Chahal v. UK*, para. 107.

¹³²¹ *Ibid*, para. 78.

¹³²² *Ibid*, para. 79.

¹³²³ *Ibid*.

¹³²⁴ *Ibid*, para. 80.

¹³²⁵ *Ibid*, para. 96.

¹³²⁶ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 516.

¹³²⁷ Hemme Battjes, “In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed”, *Leiden Journal of International Law* 22 (2009): 588.

¹³²⁸ *Ibid*.

subject to reservations,¹³²⁹ and that, in the event of a conflict with other rights, the absolute right must always prevail.¹³³⁰ In their words, “an absolute right must be superior to other rights which do not bear a similar label”.¹³³¹ Of course, they acknowledged that these characteristics constitute a theoretical ideal, the features of which should, at least in part, be reflected in the jurisprudence of the Strasbourg organs.¹³³²

Intriguingly, in a joint partly dissenting opinion signed by several judges they agreed with the stances of the Court only in certain respects.¹³³³ While accepting the part of the Court’s decision in that a state cannot rely on national security concerns to justify subjecting individuals within its jurisdiction to ill-treatment and that “in that sense the protection afforded by Article 3 is absolute in character”¹³³⁴, they argued that in cases of extra-territorial application, a state may legitimately strike a fair balance between the threat to state’s national security and the risk of ill-treatment the individual might face upon removal.¹³³⁵ Therefore, by introducing some sort of “contextual absoluteness” which is implied by the used phrase “in that sense”, judges clearly challenged the categorical nature of the protection under Article 3, especially considering the Court’s general reluctance to allow any balancing under Article 3, even in removal cases.

Be that as it may, it can be argued that *Chahal* firmly established the absolute nature of Article 3, confirming that a state cannot deport an individual to face ill-treatment abroad, regardless of national security concerns and rejecting proportionality in removal cases.

Notwithstanding the heightened international political pressure in the aftermath of 9/11, the Court reaffirmed the *Chahal* ruling in the case of *Saadi v. Italy*, where the UK government, acting as a third-party intervener, tried and ultimately failed, to weaken the absolute protection guaranteed by Article 3.¹³³⁶ The ECtHR acknowledged the danger and threat of terrorism that states currently face, but highlighted that it must not “call into question the absolute nature of Article 3”.¹³³⁷ Reiterating that “protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment”,¹³³⁸ the Court held that, even in light of the heightened terrorist threat, this did not undermine the conclusions reached in *Chahal* judgment “concerning

¹³²⁹ They referred to Article 21 of the Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, ETS 126, 26 November 1987.

¹³³⁰ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 516.

¹³³¹ *Ibid.*

¹³³² *Ibid.*

¹³³³ ECtHR, *Chahal v. UK*, Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits, para. 1.

¹³³⁴ *Ibid.*

¹³³⁵ *Ibid.*

¹³³⁶ Philip Leach, “The European system and approach”, in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 413. See also Martin Scheinin, “Counter-terrorism and human rights” in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (Routledge, 2013), 586-587.

¹³³⁷ ECtHR, *Saadi v. Italy*, App. No. 37201/06, Judgment of 28 February 2008, para. 137.

¹³³⁸ *Ibid.*, para. 138.

consequences of the absolute nature of Article 3”¹³³⁹. Obviously, the Court rejected the idea that the absolute nature of the prohibition could be weakened, refusing to introduce any form of balancing test as suggested by the intervener.¹³⁴⁰ Nina Vajić paid particular importance to the fact that all judges of the Grand Chamber unanimously reached this conclusion, giving it even greater weight.¹³⁴¹ She understood this judgment as confirming that the Court would not accept any restrictive interpretation of absolute rights unless it took place under the Court’s own supervision and as a strong reaffirmation of the absolute nature of the prohibition of ill-treatment.¹³⁴²

Finnis criticised the ECtHR’s approach to Article 3, claiming that the Court has compromised the logic of absolute norms by extending the scope of this right, as it “requires that a norm’s absoluteness narrow, not broaden its scope as an absolute”.¹³⁴³ As already explained in the first chapter, author maintained that it should apply only to those cases that involve intentional acts, with the aim at inflicting ill-treatment.¹³⁴⁴ Yet the Court, particularly in cases such as *Chahal* and *Saadi*, has extended its reach to situations where the deporting state bears no intention to cause harm, hence for Finnis, this shift results in logical inconsistency.¹³⁴⁵ Finnis also reproached the Court’s reasoning in cases such as *N v. United Kingdom*, where it allowed the deportation of a seriously ill woman to a country where she would likely die due to lack of medical care and justified the decision by reason of the excessive burden on the host state, which he interpreted as accepting that the burden defeated the claimed absoluteness of Article 3.¹³⁴⁶ To cite the Court on the matter:

“Inherent in the whole of the Convention is a 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. [...] Article 3 does not place an obligation on the Contracting State to [provide] free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States”.¹³⁴⁷ Smet found such an explicit acknowledgment particularly troubling, since “fair balance” and “absolute rights” cannot co-exist together,¹³⁴⁸ and concluded that in the end the Court has sacrificed the absolute nature of Article 3 in the “AIDS cases”.¹³⁴⁹

This was enough for Finnis to conclude that “Article 3 is not absolute”, “except when the Court says it is”.¹³⁵⁰ To be completely fair, this citation remarkably disturbed many scholars within the absolutist camp, and obviously not without a reason. It was seen as in complete

¹³³⁹ *Ibid*, para. 141.

¹³⁴⁰ Nina Vajić, “Does Absolute Still Mean Absolute? The Saadi v. Italy Judgment of the European Court of Human Rights”, in *International Law: New Actors, New Concepts – Continuing Dilemmas; Liber Amicorum Božidar Bakotić*, eds. Budislav Vukas and Trpimir M. Šoškić (Koninklijke Brill NV, 2010) 446.

¹³⁴¹ *Ibid*.

¹³⁴² *Ibid*, 450.

¹³⁴³ Finnis, “Absolute Rights”, 197.

¹³⁴⁴ *Ibid*, 199.

¹³⁴⁵ *Ibid*, 204-206.

¹³⁴⁶ *Ibid*, 212.

¹³⁴⁷ ECtHR, *N. v. UK*, App. No. 26565/05, Judgment of 27 May 2008, para. 44.

¹³⁴⁸ Smet, “The ‘Absolute’ Prohibition of Torture”, 291-292.

¹³⁴⁹ *Ibid*, 293.

¹³⁵⁰ Finnis, “Absolute Rights”, 213.

opposition to the absolute nature of Article 3 and a typical example of displacement of the right, as it not only introduced “cultural relativism”, but also applied different threshold for what amounts to ill-treatment in domestic and extradition contexts.¹³⁵¹

Overall, for Finnis, the Court only seems to be rhetorically committed to absolutism, but in reality, it treats Article 3 as contextually relative, dependant on the case at hand, while the true principle of this right is “the outlawing of all conduct (acts or omissions, whether one’s own or others’) *intended* (whether as a means or an end) to torture, degrade or subject to inhuman treatment”.¹³⁵²

When it comes to the specific type of mistreatment expected in the destination country, the ECtHR has rarely made a clear determination and on the occasions where it has identified a particular prohibited form, this has typically involved anticipated torture or inhuman treatment.¹³⁵³ For this reason, Arai-Yokoi concluded that it is highly improbable that the Court would grant protection under Article 3 in cases where the applicant’s claim concerns only the prospect of degrading treatment. These aspects of the case-law therefore risk undermining the ostensibly “absolute nature” of the protection afforded by Article 3, as the required threshold of severity in expulsion and asylum cases is set notably higher than in other contexts.¹³⁵⁴

This line of scepticism may also stem from the Court’s peculiar explanations offered in the *Babar Ahmad* case, where it was said to apply “a double standard” by admitting that a treatment that would normally qualify as ill-treatment in national context does not necessarily meet the severity threshold in expulsion cases.¹³⁵⁵ Namely, the Court underlined that the *Chahal* ruling is to be applied to extradition and other types of removal, “without distinction between the various forms of ill-treatment which are proscribed by Article 3”.¹³⁵⁶ Nevertheless, the ECtHR agreed with “Lord Brown’s observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State”.¹³⁵⁷ It clarified that “treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a Contracting State’s negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context”.¹³⁵⁸ The Court went on to give examples of factors that were decisive in the Court’s finding that Article 3 was violated, with an emphasis that “all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context”.¹³⁵⁹

¹³⁵¹ Mavronicola and Messineo, “Relatively Absolute?”, 600-601.

¹³⁵² Finnis, “Absolute Rights”, 213.

¹³⁵³ Arai-Yokoi, “Grading Scale of Degradation”, 413.

¹³⁵⁴ *Ibid.*

¹³⁵⁵ Lehto, “Applicability of Article 3”, 68.

¹³⁵⁶ ECtHR, *Babar Ahmad and Others v. UK*, para. 176.

¹³⁵⁷ *Ibid.*, para. 177.

¹³⁵⁸ *Ibid.*

¹³⁵⁹ *Ibid.*, para. 178.

Commentators described this reasoning as “a relativist dictum” that amounted to an inappropriate specification of Article 3 of the ECHR and reflected the internal displacement of the right through the back door.¹³⁶⁰ This displacement was a consequence of the inconsistency in the Court’s approach, which treated certain acts or omissions as falling within the protection of Article 3 domestically, yet excluding them in the expulsion cases, thereby undermining the absoluteness of the right at hand.¹³⁶¹

Finally, it is worth presenting how Battjes analysed the absoluteness of rights, interpreting Article 3 and its case-law. To begin with, a textual argument was invoked, stating that the typical approach of the ECHR to human rights includes envisioning certain limitations, thus involving balancing, whereas such balancing is not permitted under Article 3, as it “makes no provision for exceptions”.¹³⁶² He inferred that absolute, then, seems to imply that no justification for interference is permitted.¹³⁶³ However, it was rightly observed that the absence of a formal clause allowing for restrictions does not necessarily mean that restrictions are entirely excluded, as demonstrated by Article 6 of the ECHR, which also lacks an explicit limitation clause, but the Court still allowed for implicit limitations,¹³⁶⁴. This is where the “fundamental importance” argument came into play, which the ECtHR used extensively in regard to Article 3, even though it reflects a value judgment rather than something that can logically be derived from the ECHR text.¹³⁶⁵ While these were all arguments internal to the Convention frameworks, Battjes argued that the ECtHR also resorted to the external ones. For instance, it was underlined that in the *Soering* judgment, as already described, the Court underlined a similarly unqualified prohibition of ill-treatment in both the ICCPR and the ACHR, a point that certain scholars interpreted as echoing the language of *jus cogens*.¹³⁶⁶ Even though the Court did not invoke that magical notion, it appeared to allude to the norm generally accepted and recognised by the international community of states as a whole.¹³⁶⁷ Battjes was confident that in a later judgment, the ECtHR took this argument a step further, explicitly qualifying the prohibition of torture as a *jus cogens* norm.¹³⁶⁸ Therefore, the peremptory status confirmed the absolute character of Article 3.¹³⁶⁹

However, it appears that Battjes employed the exact same thing that he accused the Court of – a circular argument. By praising the Court for finally taking courage to qualify a norm as *jus cogens*, it may seem as if it was indicated that a norm is absolute because it is of *jus cogens* character and at the same time that it is *jus cogens* because it is absolute. In other words, the clear distinction between the two categories was blurred. Moreover, by failing to address the possibility that the Court may have left the door open for selective and

¹³⁶⁰ Mavronicola and Messineo, “Relatively Absolute?”, 601.

¹³⁶¹ *Ibid.*

¹³⁶² Battjes, “In Search of a Fair Balance”, 587.

¹³⁶³ *Ibid.*, 588.

¹³⁶⁴ See ECtHR, *Al-Adsani v. UK*, para. 53. This was explained in the previous chapter of this thesis, see Battjes, “In Search of a Fair Balance”, 588.

¹³⁶⁵ Battjes, “In Search of a Fair Balance”, 589.

¹³⁶⁶ *Ibid.*, 590.

¹³⁶⁷ This is reference to the language of Article 3 of the VCLT. See Rick Lawson, *Het EVRM en de Europese Gemeenschappen* (Deventer: Kluwer, 1999), 176, as cited in Battjes, “In Search of a Fair Balance”, 590.

¹³⁶⁸ *Ibid.*, 591. See ECtHR, *Al-Adsani v. UK*, para. 60.

¹³⁶⁹ *Ibid.*, 592.

potentially inconsistent application of “fundamental importance” argument to different human rights, the analysis did not sufficiently highlight the potential pragmatism and occasional rhetorical manoeuvring present in the Court’s case law regarding absolutism.

Be that as it may, Battjes’ analysis was particularly striking in *non-refoulement* cases, where he understood the Court’s reasoning in *Soering* judgment as follows: “the prohibition of torture is a fundamental value, expressed both in an international instrument (ICCPR) and in the ‘absolute’ Article 3 ECHR. One aspect of this value is prohibition of expulsion resulting in torture. This is deduced from that value explicitly on the international level in Article 3 CAT, which hence spells out one of the aspects of Article 7 ICCPR, and hence of Article 3 ECHR – for these provisions codify the same value. The ‘absolute’ nature of Article 3 serves to express the fundamentality of its ‘underlying value’, and informs us about the scope of the provision: it covers expulsion cases”.¹³⁷⁰ Therefore, the absolute nature of Article 3 reflects the fundamental importance of the value it protects, and it is precisely this that justifies interpreting its scope to cover these (expulsion) cases.¹³⁷¹

Yet Battjes’ reproach was directed towards the fact that the Court applies balancing with regard to Article 3 in several respects.¹³⁷² For instance, when assessing whether there is a real risk that the person facing expulsion would be subjected to ill-treatment upon return, the individual’s interest that the risk is rigorously assessed is balanced against the broader interest in limiting the resources needed for such assessments.¹³⁷³ When it comes to the standard of proof, the expellee’s interest in a lower or more lenient threshold is balanced against the same general interest, and finally, the classification of an act as torture, or as inhuman or degrading treatment or punishment, also involves (at least implicit) balancing.¹³⁷⁴ Consequently, Battjes claimed that “the difference between ‘absolute’ and qualified provisions is one of technique”, as both allow for justifiable restrictions, it is just that for the latter there is a basis for that in the ECHR text, whereas with the former it stems from the “underlying notion of the search for a fair balance”.¹³⁷⁵

Despite the tension between maintaining the strict condemnation of ill-treatment and taking into account competing interests is present in all *refoulement* cases,¹³⁷⁶ the author still found meaning in the label “absolute”, arguing that it tilts the balance heavily in favour of the individual and also strengthens, if not decisively determines, the argument for including *refoulement* within the scope of Article 3, including the extension of the same protection to cases such as those involving medical concerns.¹³⁷⁷

It was concluded that the Court often strategically resorts to both the terms “absolute” and “balancing”, but that the “absolute” or fundamental nature of the prohibition serves not only as a strong argument for adopting a broad, inclusive interpretation, but also serves as a limitation to broad discretionary powers of the Court.¹³⁷⁸ Evidently, however, the

¹³⁷⁰ *Ibid*, 593.

¹³⁷¹ *Ibid*, 594.

¹³⁷² *Ibid*, 618.

¹³⁷³ *Ibid*.

¹³⁷⁴ *Ibid*.

¹³⁷⁵ *Ibid*.

¹³⁷⁶ *Ibid*, 621.

¹³⁷⁷ *Ibid*, 618.

¹³⁷⁸ *Ibid*, 619.

absolute nature of the prohibition does not and cannot completely rule out all forms of balancing.¹³⁷⁹

All in all, the principle of *non-refoulement* is another significant aspect of Article 3 rights, which arises from what may be seen as the result of Court's extensive interpretation but could also be said to represent a strong affirmation of the right's absolute character. In any case, the logic here is straightforward — if the cases concerning deportation or expulsion fall within the scope of Article 3, and they do, and if Article 3 is absolute, then absolute protection necessarily applies to them as well.

Somewhat similar approach was adopted by other human rights monitoring bodies. In its commentary on the Article 7 of the ICCPR, the HRC explicitly stated that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement".¹³⁸⁰ More than a decade later, it reiterated this position by emphasizing that every State Party "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".¹³⁸¹

The CAT, which monitors implementation of the UNCAT also took a view that Article 3 of the Convention guarantees absolute protection to anyone in the territory of a state party, irrespective of the person's character or whether there is the danger to society.¹³⁸²

Within the UN system, it is noteworthy that the UNHCR also issued an Advisory Opinion in which it confirmed that "the prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*" and that "it includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments".¹³⁸³

The ACHR even contains an explicit provision on *non-refoulement* in Article 22, paragraph 8, stating that "in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions". It is true that this provision offers complementary protection to aliens who are not asylum seekers or refugees, but are under authority or control of the state at hand, in cases in which their right to life or freedom is threatened.¹³⁸⁴ That said, the IACtHR took the view that despite the fact that the principle is binding on all states irrespective of whether they are part of the UN Refugee Convention, it is "not absolute

¹³⁷⁹ *Ibid.*

¹³⁸⁰ HRC, CCPR General Comment No. 20, para. 9.

¹³⁸¹ HRC, CCPR General Comment No. 31, para. 12.

¹³⁸² CAT, *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, 29 November 2007, para. 10.2.

¹³⁸³ UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 21.

¹³⁸⁴ IACtHR, Advisory Opinion OC-21/14, para. 217, 219.

because it allows for exceptions".¹³⁸⁵ The Court pointed out to the situations envisaged by that Convention when the states may not provide the protection even though a person is a refugee. It was also added that "such situations should be interpreted rigorously and restrictively and in relation to the obligations derived from non-derogable rights".¹³⁸⁶ However, the Court explained that "this principle seeks, above all, to ensure the effectiveness of the prohibition of torture in any circumstance and with regard to any person, without any discrimination" and "since it is an obligation derived from the prohibition of torture, the principle of non-refoulement in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of *ius cogens*".¹³⁸⁷ In other words, the Court held that, notwithstanding the exceptions laid down by the international refugee law, the principle is absolute within the Inter-American system of human rights. It clarified that "in situations in which the individual faces a risk of torture, the principle of *non-refoulement* is absolute."¹³⁸⁸ Therefore, it can be concluded that this is a unanimous stance among all analysed human rights bodies.

5. The Prohibition of Slavery and Human Trafficking

"The great fundamental principle of Abolitionists is, that man cannot rightfully hold his fellow man as property. Therefore, we affirm, that every slaveholder is a man-stealer. We do so, for the following reasons: to steal a man is to rob him of himself."

- Angelina Grimké (Letter to Catharine E. Beecher, 1838)

Another right that is non-derogable under all three treaties is the prohibition of slavery and servitude.

The second Article of the Paris Minimum Standards identifies the freedom from slavery and servitude and demands that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms".¹³⁸⁹

It is set out in Article 4, paragraph 1 of the ECHR in unqualified terms: "No one shall be held in slavery or servitude." For the terminological clarification, the ECtHR explained that "servitude corresponds to a special type of forced or compulsory labour or, in other words, 'aggravated' forced or compulsory labour. As a matter of fact, the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim's feeling that their condition is permanent and that the situation is unlikely to change. It is sufficient that this feeling be based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation."¹³⁹⁰ In words of the commentators, while slavery is a complete legal ownership of another person, servitude indicates less far-reaching forms of restraint,

¹³⁸⁵ *Ibid*, para. 211.

¹³⁸⁶ *Ibid*.

¹³⁸⁷ *Ibid*, para. 225.

¹³⁸⁸ *Ibid*, para. 236.

¹³⁸⁹ Lillich, *The Paris Minimum Standards*, 1075.

¹³⁹⁰ ECtHR, *C. N. and V. v. France*, App. No. 67724/09, Judgment of 11 October 2012, para. 91.

such as the obligations to work or to render services from which the person cannot escape and which he cannot change.¹³⁹¹

The second paragraph of the same article prohibits the imposition of forced or compulsory labour, while the last paragraph specifies the exact forms of work that are excluded from this provision, resembling pinpoint exceptions.¹³⁹² To cite the ECtHR, “Article 4, para. 3 of the Convention is not intended to ‘limit’ the exercise of the right guaranteed by paragraph 2, but to ‘delimit’ the very content of that right, for it forms a whole with paragraph 2 and indicates what the term ‘forced or compulsory labour’ is not to include”.¹³⁹³ However, for the purpose of this analysis, only the non-derogable provision is relevant, that is, the status recognised exclusively for the first paragraph, according to the Article 15 of the ECHR.

Doctrinal interpretations have consistently viewed the prohibition as absolute.¹³⁹⁴ To begin with, it was emphasised that since the very emergence of human rights and freedoms, there is a clear historical tendency toward the weakening of those state functions dominated by class oppression, coercion, and exploitation for the accumulation of wealth and the creation of great inequality in the distribution of material goods, which clearly illustrate how difficult and prolonged the process of civilisational advancement has been, and how, through social and even political struggle, humanity arrived at what is fundamentally embodied in the prohibition set out in Article 4, paragraph 1.¹³⁹⁵ For Greer, apart from Article 3 and Article 7, paragraph 1, the absoluteness of Article 4, paragraph 1 also stems from the absence of explicit restrictions and the impossibility of any kind of suspension during a state of emergency.¹³⁹⁶ Although he criticised the label for the fact that the Strasbourg institutions have, though not always convincingly, relied on the implied restrictions, resulting in defining the rights in question from the outset as including certain inherent public interest exceptions, he claimed that any relationship between the rights and their restrictions should not be based on *ad hoc* balancing or a direct application of proportionality.¹³⁹⁷ Instead, interpretation must first ensure that universal minimum standards are protected, with any restrictions allowed only at the outer margins.¹³⁹⁸ Trapp also underlined that the prohibition of slavery is framed in absolute terms,¹³⁹⁹ while Giuseppe Cataldi described it as essential to human dignity, and therefore absolutely guaranteed.¹⁴⁰⁰ Finally, Harris, O’Boyle, and Warbrick found that the importance of the

¹³⁹¹ van Dijk, van Hoof, van Rijn, Zwaak, 444.

¹³⁹² See Chapter 2 of this thesis.

¹³⁹³ ECtHR, *Stummer v. Austria*, App. No. 37452/02, Judgment of 7 July 2011, para. 120.

¹³⁹⁴ Marinković, Krstić, *Evropsko pravo ljudskih prava*, 151. The same qualification can be found in Melenko, Paranyuk, “The Issue of Correlation between Absolute and Relative Human Rights: Logical-Gnosiological Analysis”, 39 and Grégoire Webber, “Proportionality and Absolute Rights”, in *Proportionality: New Frontiers, New Challenges*, ed. Vicki C. Jackson and Mark Tushnet (Cambridge University Press, 2017), 77.

¹³⁹⁵ Sadiković, “Apsolutno zaštićena ljudska prava”, 224.

¹³⁹⁶ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), 209.

¹³⁹⁷ *Ibid.*

¹³⁹⁸ *Ibid.*

¹³⁹⁹ Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 305.

¹⁴⁰⁰ Giuseppe Cataldi, “Introduction to the Universal Declaration of Human Rights”, *Europa Ethnica* 76, no. 3-4 (2019): 104.

prohibition of slavery and servitude is underscored by its status as an absolute guarantee and its non-derogable nature.¹⁴⁰¹

Although the Court's case law on slavery under Article 4 is less extensive than under Article 3, it firmly underscored that it enshrines one of the fundamental values of democratic societies and that "unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible".¹⁴⁰² Yet it usually stops short of labelling this prohibition as absolute in explicit terms, hence this status can only be indirectly inferred, as reflected in the unqualified conception of the right.

Moreover, the jurisprudence of the ECtHR reveals its efforts to align the interpretation of Article 4 with that of other absolute rights such as Article 3. For instance, after reminding that "the Court has also recently, in the case of *S. M. v. Croatia*, summarised its case-law on the procedural obligation under the converging principles of Articles 2, 3 and 4 of the Convention", it emphasised that "whereas the general scope of the State's positive obligations might differ between cases where the treatment contrary to the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the procedural requirements are similar."¹⁴⁰³ In essence, these procedural requirements focus on the authorities' obligation to launch and conduct an effective investigation that can clarify the facts, identify the perpetrators and, if justified, ensure they are punished.¹⁴⁰⁴ The Court also clarified, similarly as with regard to Article 3, that "there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence"¹⁴⁰⁵.

Interestingly enough, in the same case of *S. M. v. Croatia*, the Court explained that a situation or form of conduct will only raise an issue of human trafficking under Article 4 if all three elements set out in the international definition, under both the Anti-Trafficking Convention and the Palermo Protocol, are satisfied: first, an action, such as the recruitment, transportation, transfer, harbouring, or receipt of persons; second, threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and third, an exploitative purpose, covering at a minimum the exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.¹⁴⁰⁶ Although this is a bright example of the Court's receptiveness to the invocation of other international instruments, which undoubtedly contributes to the unification of standards, it did miss a chance to take a clear position regarding the (absolute) nature of the prohibition of human trafficking.

The state of affairs is remarkably similar within the ICCPR. The first paragraph of Article 8 of the ICCPR provides that "No one shall be held in slavery; slavery and the slave-trade

¹⁴⁰¹ Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights* (Oxford University Press, 2018), 281.

¹⁴⁰² ECtHR, *Siliadin v. France*, App. No. 73316/01, Judgment of 26 July 2005, para. 112.

¹⁴⁰³ ECtHR, *Sabalić v. Croatia*, para. 96.

¹⁴⁰⁴ *Ibid.*

¹⁴⁰⁵ *Ibid.*, para. 97.

¹⁴⁰⁶ ECtHR, *S. M. v. Croatia*, App. No. 60561/14, Judgment of 25 June 2020, para. 290. See also, ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, 31 August 2024, para. 11.

in all their forms shall be prohibited”,¹⁴⁰⁷ while the following one adds that “No one shall be held in servitude”.¹⁴⁰⁸

Primarily due to the non-derogability of the first two paragraphs of Article 8, scholars have interpreted these provisions to be absolute.¹⁴⁰⁹ Apart from considering it absolute,¹⁴¹⁰ Nowak even went so far as to argue that the prohibition of slavery constitutes a *jus cogens* norm, given its absolute and universal character and its firm acceptance by the international community as a whole.¹⁴¹¹ He contrasted this with the prohibition of forced or compulsory labour, noting that it allows for exceptions and derogations under both the ICCPR and comparable regional conventions.¹⁴¹²

Unfortunately, the HRC has not yet issued a General Comment regarding Article 8 and has therefore provided little on the legal status of the prohibition. However, it has confirmed that the prohibition of slavery, slave-trade and servitude is non-derogable.¹⁴¹³ More importantly, it has taken the position that reservations which conflict with peremptory norms are incompatible with the object and purpose of the ICCPR.¹⁴¹⁴ Accordingly, provisions that became part of customary international law “and *a fortiori* when they have the character of peremptory norms” cannot be subject to reservations.¹⁴¹⁵ The HRC explicitly stated that:

“[a] State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of

¹⁴⁰⁷ Notably, unlike the ECHR, the ICCPR specifically mentions and prohibits the slave trade. See Hartman, “Derogation from Human Rights Treaties in Public Emergencies”, 15.

¹⁴⁰⁸ Paragraph 3, similarly to the ECHR, has its own delimitation:

“(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

¹⁴⁰⁹ See for instance, Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge University Press, 2020), 220.

¹⁴¹⁰ UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Manfred Nowak*, para. 44.

¹⁴¹¹ Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*, 197.

¹⁴¹² *Ibid.*

¹⁴¹³ HRC, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 7.

¹⁴¹⁴ *Ibid.*, para. 8.

¹⁴¹⁵ *Ibid.*

their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.”¹⁴¹⁶

While the HRC’s categorical rejection of reservations to peremptory norms underscores the absolute protection of certain rights, the quoted list is not accompanied by a clear doctrinal analysis of how these norms are identified, what makes them absolute, or how their absolute status translates into concrete legal obligations for states. Yet, the legal and moral weight of such pronouncements is evident, even though the opportunity was missed to develop a more precise legal understanding of certain categories.

As is the case with the prohibition of torture, the ILC Special Rapporteur also found that the prohibition of slavery constitutes a norm of *jus cogens*, including all modern forms of slavery.¹⁴¹⁷

The ACHR went even further in broadening the prohibition, with its Article 6, paragraph 1 stating: “No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.”¹⁴¹⁸ Obviously, special protection of women constitutes an addition that is not present in the other analysed treaties. Commentators have noted that Article 6 embodies the absolute prohibition of slavery and servitude.¹⁴¹⁹ It was specified that the structure of Article 6 reflects the complexity of separating between “absolutely prohibited practices (slavery, involuntary servitude, trafficking, slave trade, forced and compulsory labour), from other forms of duties that might not be considered as forbidden (detainee’s work, military service, civic obligations, and so on)”.¹⁴²⁰ According to Article 27 of the ACHR, Article 6 is non-derogable, in its entirety, which is also characteristic of this treaty, since others consider only the

¹⁴¹⁶ *Ibid.* It added that a general reservation to the right to a fair trial would also not be acceptable.

¹⁴¹⁷ United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 107.

¹⁴¹⁸ The following paragraphs are also more extensive than those in the compared treaties:

“2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article, the following do not constitute forced or compulsory labor:

- a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;
- b. military service and, in countries in which conscientious objectors are recognised, national service that the law may provide for in lieu of military service;
- c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
- d. work or service that forms part of normal civic obligations.”

¹⁴¹⁹ Ludovic Hennebel, Hélène Tigroudja, *The American Convention on Human Rights – A Commentary* (New York: Oxford University Press, 2022), 254.

¹⁴²⁰ *Ibid.*, 255.

prohibition of slavery and servitude to be non-derogable, not the prohibition of forced and compulsory labour.

In one of the landmark cases regarding contemporary forms of slavery, the IACommHR held that “the prohibition of slavery and similar practices forms part of customary international law and *jus cogens*”, as well as that “protection against slavery is an obligation *erga omnes* which States must comply with and that is derived from international human rights law”.¹⁴²¹ Most importantly, it was explicitly stated that “the absolute and irrevocable prohibition against subjecting someone to slavery, servitude or forced labour is also recognised in the American Convention and in other international instruments”.¹⁴²² The Court agreed with this qualification, confirming that “the right not to be subject to slavery, servitude, forced labor or the slave trade and traffic in women has an absolute nature in the American Convention” and added that “according to Article 27(2) of this treaty, it is one of the core of non-derogable rights, because it cannot be suspended in case of war, public danger, or other threat”.¹⁴²³

The Court explained that “the absolute and universal prohibition of slavery is established in international law, and the definition of this concept has not varied substantially since the 1926 Convention: ‘slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.”¹⁴²⁴ When it comes to servitude, it was similarly stated that “its absolute prohibition dates from the 1956 Supplementary Convention and its codification in subsequent instruments of international law”, with the special emphasis on its Article 1 that prescribes debt bondage and serfdom to be practices similar to slavery, which must be abolished and abandoned.¹⁴²⁵ Finally, the Court was aware that, although this prohibition is sometimes regarded as a historic relic more suited to the past, it has not been fully eliminated, hence “the absolute prohibition of traditional slavery and its interpretation have evolved so that it also includes certain analogous forms of this phenomenon, which are revealed in different ways at the present time, but retain certain essential characteristics that are common to traditional slavery, such as the exercise of control over an individual by physical or psychological coercion in such a way that it entails the loss of the individual’s autonomy and his unwilling exploitation”¹⁴²⁶.

Finally, there is another relevant point regarding the ACHR. Article 21, paragraph 3, lays down two different rules, the prohibition of usury and the prohibition of any other form of exploration of man by man. Ludovic Hennebel and Hélène Tigroudja explained that it excludes human beings as potential objects of property and economic exploitation and labelled it explicitly absolute.¹⁴²⁷ Moreover, it refers directly to the prohibition of slavery, indicating that even though this article is not among non-derogable rights of the ACHR, it is an obvious expression of human dignity, which renders it absolute and non-derogable.¹⁴²⁸

¹⁴²¹ IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016, para. 209.

¹⁴²² *Ibid.*

¹⁴²³ *Ibid.*, para. 243.

¹⁴²⁴ *Ibid.*, para. 268.

¹⁴²⁵ *Ibid.*, para. 275.

¹⁴²⁶ *Ibid.*, 276.

¹⁴²⁷ Hennebel, Tigroudja, *The American Convention*, 647.

¹⁴²⁸ *Ibid.*

Despite that, in practice, the cases concerning exploitation, human trafficking, or slavery are examined exclusively under Article 6 of the ACHR.¹⁴²⁹

A comparison of how the prohibition of slavery is treated under the ECHR, ICCPR and ACHR reveals that all three system recognise its non-derogable and foundational character. However, explicit reference to its absolute nature varies across the jurisprudence of the monitoring bodies.

Within the ECHR system, it is not overtly directly classified as absolute, but its placement among the non-derogable rights, together with the Court's repeated emphasis on its fundamental importance, suggests that it is factually treated as such. Rather than making categorical statements, the Court has focused on clarifying the boundaries of the provision, for instance, distinguishing servitude from forced or compulsory labour, the latter of which remains derogable. Nevertheless, the Court's reasoning increasingly mirrors its approach to other non-derogable rights, like Article 3, especially in relation to the scope of positive obligations, once again, confirming that the "absoluteness" reasoning is being applied to this right, as well.

Categorical wording of the ICCPR provisions prohibiting slavery and servitude has led scholars to regard it as not only absolute but as reflecting a *jus cogens* norm. However, the difference between slavery and forced labour is once again preserved, with only slavery (implicitly) enjoying absolute protection.

It is in the framework of the ACHR that the absolute nature of the prohibition is most clearly and explicitly confirmed. Even though it is sometimes claimed that the practice regarding the absolute right embodied in Article 6 is still underdeveloped,¹⁴³⁰ the IACtHR has gone further than its counterparts, both in its language and in its substantive interpretation, offering, at least in this regard, a compelling model for how absolute rights might be understood and protected across the broader field of international human rights law.

6. The Prohibition of *Ex Post Facto* Laws

"In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."

- *Nuremberg Judgment (France and ors v. Göring (Hermann) and ors, 1946)*

The prohibition against the retroactive application of criminal law stems from the principle of *nullum crimen, nulla poena sine lege*, which represents a fundamental principle of criminal law that forbids punishing acts committed before they were legally defined as

¹⁴²⁹ *Ibid.*

¹⁴³⁰ Hennebel, Tigroudja, *The American Convention*, 257.

crimes.¹⁴³¹ It was back in 1789 when Article 7 of the Declaration of the Rights of Man laid down that “No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law”.¹⁴³² Scholars perceived this as underscoring the importance of the principle and a turning point in the course of legal history, distinguishing the modern, democratic state and the rule of law, with all that they entail, from the arbitrary rule of the time, characterised by a very low level of legal certainty and the poor social standing of the individual.¹⁴³³ Its value is connected to the crucial role of legal certainty in realising the ideal of justice.¹⁴³⁴ The evolution of this principle was furthered by the development of international law, through which it eventually gained recognition as an internationally protected human right - the right not to be prosecuted or punished without legal basis.¹⁴³⁵

Peculiarly, the Paris Minimum Standards did not single out the prohibition of *ex post facto* laws as a separate right, in line with the trend present in international human rights treaties, but rather included it within a broader right to fair trial, set out in Article 7.¹⁴³⁶ Namely, its paragraph 6 stipulates that “No one shall be held guilty of any criminal offences on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby”.¹⁴³⁷ Within this prohibition is also paragraph 7, which reads that “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations”.¹⁴³⁸

The prohibition is enshrined in Article 7 of the ECHR, which is titled “No punishment without law” and provides that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

In essence, this principle guarantees that a criminal offence must be clearly defined by law, while is also prohibiting the overly broad interpretation of criminal provisions, especially interpretations made by analogy.¹⁴³⁹ At its core is the idea that justice demands individuals to be held criminally liable only under laws that were in force at the time the act was committed. Simply put, this means that the law must be sufficiently clear (*lex certa*),

¹⁴³¹ Ana Zdravković, “Few Questions Yet to Be Answered in Regard to the Article 7 of the European Convention on Human Rights”, *EU and Comparative Law Issues and Challenges Series (ECLIC)*, No. 4 (2020): 671.

¹⁴³² Declaration of the Rights of Man, Approved by the National Assembly of France, 26 August 1789, available at https://avalon.law.yale.edu/18th_century/rightsof.asp (accessed on 29 April 2025).

¹⁴³³ Sadiković, “Apsolutno zaštićena ljudska prava”, 224.

¹⁴³⁴ *Ibid*, 225.

¹⁴³⁵ Zdravković, “Few Questions”, 671.

¹⁴³⁶ Lillich, *The Paris Minimum Standards*, 1079. However, it remains unclear on what basis the authors of the Paris Minimum Standards concluded that all aspects of the right to fair trial are, or should be, non-derogable.

¹⁴³⁷ *Ibid*.

¹⁴³⁸ *Ibid*.

¹⁴³⁹ ECtHR, *Kokkinakis v. Greece*, App. No. 14307/88, Judgment of 25 May 1993, para. 52.

interpreted strictly without analogy (*lex stricta*), and not applied retroactively (*lex praevia*).¹⁴⁴⁰ Therefore, Article 7 is designed to ensure legal certainty by requiring that governance is based on pre-existing legal rules. Its primary function is to restrain legislative power, obliging lawmakers to adopt criminal laws that apply only to future conduct.¹⁴⁴¹ At the same time, it limits the judiciary by requiring courts to apply only those laws that were already in force when the offence occurred, not those adopted later or in effect only at the time of trial or indictment.¹⁴⁴² Similarly, it also applies to legislation that make the punishment for the offence aggravated.¹⁴⁴³ However, it does not cover changes in procedural law.¹⁴⁴⁴

Notably, the term “law” has autonomous meaning, including judge-made law together with legislation, both primary and delegated.¹⁴⁴⁵ The term implies qualitative requirements of accessibility and foreseeability, meaning that the law must be publicly available and the individual must be able to know from the wording of the relevant law and the court’s interpretations what conduct is prohibited and what penalty may be imposed.¹⁴⁴⁶

A bright example of the Court’s use of evaluative interpretation is its inclusion of the *lex mitior* principle within the scope of Article 7. Namely, in the case of *Scoppola v. Italy* (No. 2), the Court moved away from its earlier case law and acknowledged that a defendant should be entitled to benefit from a more lenient criminal law enacted after the offence.¹⁴⁴⁷

Article 15 of the ECHR allows no derogation from Article 7, with the ECtHR explaining that “the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”¹⁴⁴⁸. The quote clearly shows that the Court treated the non-derogable nature of this Article as a confirmation of its importance within the ECHR system. Similarly, while omitting to qualify it as absolute, Harris, O’Boyle, and Warbrick also inferred the significance of this guarantee from the fact that it cannot be derogated from in times of war or public emergency.¹⁴⁴⁹ Based on this non-derogability, William Schabas concluded that some consider this prohibition to be part of *noyau dur* of human rights,¹⁴⁵⁰ while its non-

¹⁴⁴⁰ Harmen van der Wilt, “Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test”, *Nordic Journal of International Law* 84 (2015): 516.

¹⁴⁴¹ Aly Mokhtar, “Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects”, *Statute Law Review* 26, No. 1 (2005): 48.

¹⁴⁴² *Ibid.*

¹⁴⁴³ *Ibid.*

¹⁴⁴⁴ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, 2018, 492. For a different account see Zdravković, “Few Questions”, 691-694.

¹⁴⁴⁵ *Ibid.*, 493.

¹⁴⁴⁶ ECtHR, *Del Rio Prada v. Spain*, App. No. 42750/09, Judgment of 21 October 2013, para. 91.

¹⁴⁴⁷ ECtHR, *Scoppola v. Italy*, App. No. 10249/03, Judgment of 17 September 2009, para. 108. For potential deficiencies regarding this ruling see Zdravković, “Few Questions”, 687-691.

¹⁴⁴⁸ ECtHR, *S.W. v. UK*, App. No. 20166/92, Judgment of 22 November 1995, para. 35.

¹⁴⁴⁹ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, 2018, 491.

¹⁴⁵⁰ William A. Schabas, “Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals”, *European Journal of International Law* 11, No. 3 (2000): 522.

derogable character, combined with the absence of any restrictions, has also led to the recognition of its absolute nature.¹⁴⁵¹ Cataldi also included it in the list of essential, absolute rights.¹⁴⁵² The ban has been considered absolute even in the case-law of some of the highest national courts,¹⁴⁵³ though not explicitly by the ECtHR.

While the first paragraph of Article 7 is framed in terms that suggest absolute, unqualified protection, the second paragraph of Article 7 provides that “this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

It can be argued that this reflects the fragile status of the legality principle immediately following the Second World War, when it had not yet been recognised as an international human right.¹⁴⁵⁴ In fact, the period of the Nuremberg trials was notably characterised by the retroactive application of criminal law to acts deemed immoral by the international community.¹⁴⁵⁵ Hence, in order to eliminate any doubt about validity of the post-Second

¹⁴⁵¹ Hartman, “Derogation from Human Rights Treaties in Public Emergencies”, 15; Zdravković, “Few Questions”, 672.

¹⁴⁵² Cataldi, “Introduction”, 104. The same stance that this is an absolute right is in Melenko, Paranyuk, “The Issue of Correlation Between Absolute and Relative Human Rights”, 39.

¹⁴⁵³ ECtHR, *Bergmann v. Germany*, App. No. 23279/14, Judgment of 7 January 2016, para. 71. However, there are examples that could be described as attempts to relativise this principle with a view to establishing a basis for prosecuting international crimes, even after Nuremberg and Tokyo. For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY) cited rulings of the national court in the Netherlands, stating that: “In so far as the appellant considers punishment unlawful because his acts, although illegal and criminal, lacked a legal sanction precisely outlined and previously prescribed, this objection also fails. The principle that no act is punishable in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving punishment, were to be considered punishable after the event. However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent”, ICTY, *Prosecutor v. Drazen Erdemović*, Judgement of 29 November 1996, para. 38. See also, Netherlands Special Court of Cassation, *Trial of Hans Albin Rauter*, Case No. 88, Judgment of 12 January 1949, 542-543. Shabas noted that this stance reflected Hans Kelsen’s position on *nullum crimen nulla poena* being a principle of justice, thereby requiring that Nazi criminals were punished, Shabas, “Perverse Effects of the *Nulla Poena* Principle”, 539. See also Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?”, *International Law Quarterly* 1, No. 2 (1947): 165.

¹⁴⁵⁴ Aleksandra Rychlewska, “The *Nullum Crimen Sine Lege* Principle in the European Convention of Human Rights: The Actual Scope of Guarantees”, *Polish Yearbook of International Law* 36 (2016): 164.

¹⁴⁵⁵ Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), 72. Even the Nuremberg Tribunal itself openly acknowledged that it was applying the law retroactively, stating: “The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. The Nazi leaders must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression”, see International Military Tribunal, *France et al. v. Goering et al.*, Judgment of 1 October 1946, 411, 466

World War prosecutions and to prevent Nazi criminals to invoke a violation of *nullum crimen sine lege* principle,¹⁴⁵⁶ the so-called “Nuremberg clause” was inserted into Article 7.

When considering the legal nature of this clause, caution is needed before classifying it as a true derogation¹⁴⁵⁷ or exception¹⁴⁵⁸ from the principle of non-retroactivity. Although even the ECtHR has described it as “an exceptional derogation from the general principle laid down in the first paragraph”, it also referred to the *travaux préparatoires*, which show that the second paragraph was intended simply to clarify that Article 7 does not affect laws aimed, in the wholly exceptional circumstances following the Second World War, at punishing crimes such as war crimes, treason, or collaboration with the enemy.¹⁴⁵⁹ Taking into account that Article 7 is non-derogable, it follows that the second paragraph is by no means a derogation from the first, but rather, as the ECtHR has accurately indicated, that “Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war”¹⁴⁶⁰.

Therefore, it is clear that the drafters did not intend to allow any general exception to the principle of non-retroactivity.¹⁴⁶¹ Instead, the second paragraph of Article 7 should be understood as an interpretation clause, clarifying that the ECHR permits states to punish for acts which, despite not being criminalised under national law at the time, were nonetheless contrary to the general principles of law recognised by civilised nations, *i.e.*, were prohibited under international law.¹⁴⁶² Supporting this conclusion is also the fact that all of these acts are, by their very nature, *mala in se*, rather than *mala prohibita*, meaning that a common sense of justice implies that such acts are inherently wrong, hence it cannot be claimed that the perpetrators were unaware, at the time of committing the acts, that their conduct was prohibited.¹⁴⁶³ After all, the Court did clarify that the two paragraphs of Article 7 are interconnected and should be interpreted “in a concordant manner”.¹⁴⁶⁴

Ultimately, it can only be tentatively ascertained that the prohibition of *ex post facto* laws under the ECHR is, in both its normative structure and judicial interpretation, treated as an absolute right. Although the Court allowed for some evolution in the interpretation of criminal norms, it has consistently protected individuals against the retroactive application of criminal laws that would create offences or impose harsher penalties.

When it comes to the ICCPR, the first paragraph of Article 15 lays down that “No one shall be held guilty of any criminal offence on account of any act or omission which did not

¹⁴⁵⁶ ECtHR, *Kononov v. Latvia*, App. No. 36376/04, Judgment of 17 May 2010, para. 159.

¹⁴⁵⁷ For such a qualification see B. Virjan, “Principle of Non-Retroactivity of Criminal Law According to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”, *Law Annals of Titu Maiorescu University* (2012): 102.

¹⁴⁵⁸ As qualified by Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, 2018, 500.

¹⁴⁵⁹ ECtHR, *Kononov v. Latvia*, para. 115.

¹⁴⁶⁰ ECtHR, *Maktouf and Damjanović*, App. Nos. 2312/08, 34179/09, Judgment of 18 July 2013, para. 189

¹⁴⁶¹ *Ibid.*

¹⁴⁶² Zdravković, “Few Questions”, 673.

¹⁴⁶³ That is not the case with *mala prohibita* acts, where the prohibition is not intuitive, but solely based on legal regulation. An example for such a crime would be hitchhiking, which is prohibited in some countries but not in others. See Zdravković, “Few Questions”, 677.

¹⁴⁶⁴ ECtHR, *Kononov v. Latvia*, para. 186.

constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby". Apparently, the ICCPR added the benefit of a reduction in penalty occurring after the offence, thereby broadening the textual protection compared to the ECHR. The following paragraph is quite similar to that in the ECHR: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations". Article 15 is listed among the non-derogable rights in Article 4 of the ICCPR.

While the HRC has not yet issued a specific general comment on this Article, its jurisprudence offers some insights regarding the treatment of the prohibition against retroactive criminal laws. In its concluding observations on various state reports, the Committee has put special emphasis on the fact that the prohibition is non-derogable. For instance, it has remarked that vague definitions of certain crimes, such as those found in counter-terrorism legislation, run counter to the principle of legality, which has "adverse consequences on the rights protected under article 15 of the Covenant, which is non-derogable".¹⁴⁶⁵ Similarly, it was concerned that national legislation might impose restrictions on the freedom from retroactive punishment and it insisted that this right must be non-derogable.¹⁴⁶⁶

Evidently, much like the ECtHR, while it is not common to find an explicit reference to absoluteness in its standings, the HRC places significant weight on its non-derogability, treating it as proof of right's fundamental importance.

Finally, Article 9 of the ACHR stipulates that "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom". Substantially, the provision is the same as the first paragraph of Article 15 of the ICCPR. Yet, it is also noticeable that the article does not contain a "Nuremberg clause", which is most likely due to the fact that the vast majority of Latin American countries did not actively participate in the Second World War.¹⁴⁶⁷

While the prohibition of *ex post facto* laws is non-derogable under the ACHR as well, and contains no exceptions or even an interpretation clause, the IACtHR did not resort to labelling it explicitly "absolute" in its decisions.

However, in regard to Article 9 of the ACHR, the Court did clarify that "the protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the

¹⁴⁶⁵ HRC, *Concluding Observations on the Second Periodic Report of Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 14.

¹⁴⁶⁶ HRC, *Concluding Observations on the Fourth and Fifth Reports of Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003, para. 8.

¹⁴⁶⁷ For more see Hennebel, Tigroudja, *The American Convention*, 372.

State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power".¹⁴⁶⁸

It considered that:

"[c]rimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalised conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviours, violate the principle of *nullum crimen nulla poena sine lege praevia* recognised in Article 9 of the American Convention".¹⁴⁶⁹

Taking everything said into account, it seems safe to conclude that the inclusion of the prohibition among the non-derogable rights and the consistent interpretation by the monitoring bodies affirm that individuals are protected from retroactive criminal legislation under all circumstances.

7. *Ne Bis in Idem*

"Your worship should bear in mind, Senor Don Quixote, that if the knight has done what was commanded him in going to present himself before my lady Dulcinea del Toboso, he will have done all that he was bound to do, and does not deserve further punishment unless he commits some new offence."

- Miguel de Cervantes (*Don Quixote*, 1605)

The principle of *ne bis in idem*, which prohibits the trial or punishment of a person for an offence for which they have already been finally convicted or acquitted, has acquired the status of a human right, as well.

Much like the prohibition of *ex post facto* laws, *ne bis in idem* is also part of the right to fair trial within the Paris Minimum Standards, whose Article 7, paragraph 8 stipulates that "No person shall be prosecuted and punished for the same offence more than once, or for a similar offence based upon the same facts that has resulted in a conviction or acquittal".¹⁴⁷⁰

It is guaranteed under Article 4 of Protocol No. 7 to the ECHR, which states that "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." The prohibition was

¹⁴⁶⁸ IACtHR, *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, para. 120.

¹⁴⁶⁹ *Ibid*, para. 121.

¹⁴⁷⁰ Lillich, *The Paris Minimum Standards*, 1079.

proclaimed non-derogable by the paragraph 3 of the same article, underscoring its nature as a fundamental human right.¹⁴⁷¹

Affirming the importance of legal certainty, it ensures the authority of judgments rendered through predetermined and mandatory procedures and safeguards the absolute protection against arbitrary intrusion by the state into the individual's private sphere.¹⁴⁷² Yet, it is rarely labelled as an absolute right in both theory and practice.¹⁴⁷³

In a comparable manner to the prohibition of *ex post facto* laws, the Court was not logorrheic in elaborating its legal nature or potential absolute status. Instead, any reference to it must be indirectly deduced.

One of the Court's most well-known positions on this right is its relatively broad interpretation of the concept "idem", where it held that this prohibition must be understood as prohibiting "the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts that are substantially the same".¹⁴⁷⁴ Simply put, the Court established a broad and autonomous concept of "the same offence" based on a factual, rather than legal, approach. This interpretation created significant challenges for states in terms of proper understanding and implementation, especially because it did not take into account the structural differences between various national criminal justice systems, especially regarding the relations between criminal offences and misdemeanours. As a result, the Court toned down its position in a subsequent decision,¹⁴⁷⁵ signalling a willingness to depart from the previously adopted (and arguably inadequate) approach.¹⁴⁷⁶

In any case, what stands out in the ECtHR's jurisprudence on this right is that it avoids the language of proportionality and instead applies a strict test focused on whether the previously established conditions are fulfilled, such as whether the facts of the case can be regarded as "bis" and "idem".

However, it must be noted that the second paragraph of Article 4 of the Protocol No. 7 provides that "the provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case". From the perspective of the Court, this provision "sets a limit on the application of the principle of legal certainty in criminal matters."¹⁴⁷⁷ Curiously, it added that "the requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 § 2 of Protocol

¹⁴⁷¹ Ger Coffey, "An interpretative analysis of the European ne bis in idem principle through the lens of ECHR, CFR and CISA provisions: Are three streams flowing in the same channel?", *New Journal of European Criminal Law* 14, No. 3 (2023): 345-373.

¹⁴⁷² Sadiković, "Apsolutno zaštićena ljudska prava", 225.

¹⁴⁷³ For a rare example of such qualification see Ana Zdravković, "Ne Bis in Idem in the Jurisprudence of the European Court of Human Rights with Special Emphasis on the case *Milenković v. Serbia*", *Eudaimonia - Journal for Legal, Political and Social Theory* 5, No. 2 (2021): 61.

¹⁴⁷⁴ ECtHR, *Zolotukhin v. Russia*, App. No. 14939/03, Judgment of 10 February 2009, para. 82.

¹⁴⁷⁵ See ECtHR, *A. and B. v. Norway*, App. No. 29758/11, Judgment of 15 November 2016, paras. 125-132.

¹⁴⁷⁶ For more see Zdravković, "Ne Bis in Idem", 53-92.

¹⁴⁷⁷ ECtHR, *Mihalache v. Romania*, App. No. 54012/10, Judgment of 8 July 2019, para. 129.

No. 7, which expressly permits Contracting States to reopen a case where new facts emerge, or where a fundamental defect is detected in the proceedings”.¹⁴⁷⁸

Thus, the Court did not state that the right stemming from *ne bis in idem* is not absolute, but instead referred to the principle of legal certainty. As explained in the previous chapter, no principle is absolute in itself, but each strives to be realised to the fullest possible extent in every case, and legal certainty is no exception. Now, speaking of exceptions, a question that inevitably arises concerns the character of the cited second paragraph, or in other words, asks does it constitute an exception to the first paragraph. It can hardly be regarded as an exception, any more than the second paragraph of the Article 7 can. The thing is that due to evidence of new or newly discovered facts, it cannot be regarded as a repeated proceedings for the same offence, as the conditions under “idem” would not be satisfied, since it is required that facts must be identical or substantially the same.¹⁴⁷⁹ And they are not identical nor substantially the same since there are new or newly discovered facts. Or, if there was a fundamental defect in the proceedings, it could be argued that “bis” would not be satisfied, as the first proceedings was deficient, and conclusively not valid, hence it is not “repeated”, but corrected. Therefore, the second paragraph only functions as a sort of an interpretation clause, delineating the scope of the provision, rather than constituting any form of human rights restriction *per se*.

As a matter of fact, the *ne bis in idem* guarantee operates in a manner structurally analogous to the prohibition of torture under Article 3 ECHR. In both cases, the ECtHR engages in some form of a threshold assessment, where for *ne bis in idem*, this involves determining whether there is a duplication of proceedings for the same offence and whether a final decision has already been rendered. Similarly, when it comes to Article 3 cases, the Court evaluates if the treatment in question is severe enough to be qualified as torture or inhuman or degrading treatment. In both cases, once the Court finds that the definitional elements of autonomous concepts are satisfied, the right is triggered, and applied without any balancing against competing interests. In other words, it is always an either-or reasoning. This could be understood as indicating the shared absolute nature of both rights, evident once the legal criteria for their applicability are met.

That this interpretation may hold true is also reflected in the way the Court treats this right. For instance, in one of its Advisory Opinion, while contemplating on the statutes of limitations, it recognised “in the context of the reopening of proceedings, that there may be situations where it is *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators were acquitted and cannot be put on trial for the same offence, or in cases in which the criminal proceedings became time-barred on account of the statute of limitation set out in the national legislation”.¹⁴⁸⁰ In other words, the Court did not put in the foreground the fact that there are instances when the resumption of criminal proceedings would be allowed, but emphasised that *ne bis in idem* is a procedural bar that must be respected, even in the face of serious alleged human rights violations or when interest of substantive justice may demand it. So, it allowed no room for balancing.

¹⁴⁷⁸ *Ibid*, para. 129.

¹⁴⁷⁹ See ECtHR, *Zolotukhin v. Russia*, para. 82.

¹⁴⁸⁰ ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, para. 66.

However, the ECtHR has recognised something resembling an exception to this right in its jurisprudence. Namely, Article 20 of the Rome Statute of the International Criminal Court contains what the ECtHR has labelled as “an explicit exception to the *ne bis in idem* principle”,¹⁴⁸¹ as it permits a second trial for the same conduct when the initial proceedings had a purpose of shielding the person concerned from criminal responsibility for crimes within the ICC’s jurisdiction, or were not conducted independently or impartially in accordance with due process recognised in international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹⁴⁸² A similar understanding of the ECtHR’s approach can be found in the joint concurring opinion of Judges Ziemele, Berro-Lefèvre and Karakaş, who underlined that under contemporary international law, amnesty may be used insofar as “it is not designed to shield the individual concerned from accountability for gross human rights violations or serious violations of international humanitarian law”.¹⁴⁸³ They viewed the Court’s decision as consistent with the drafting of the Rome Statute, in affirming the absolute prohibition of amnesty concerning such violations that apparently takes precedence over the right to avoid double jeopardy.¹⁴⁸⁴

So, even if one were to accept that the second paragraph of Article 4 of Protocol No. 7 does not amount to an exception to the right guaranteed by the *ne bis in idem* principle, and with the full recognition of the fact that the Court refrains from applying its usual proportionality analysis when adjudicating cases invoking this provision, the Court has still, in certain cases, acknowledged exceptions beyond the scope of the guarantees contained in this right, that concerned gross violations of human rights and avoiding criminal responsibility.

Be that as it may, despite the fact that the principle is a significant aspect of legal certainty and a cornerstone of procedural justice, the described approach arguably prevents classifying it as an absolute right within the ECtHR’s jurisprudence.

The principle of *ne bis in idem* is enshrined in Article 14, paragraph 7 of the ICCPR, which states that “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

What stands out is that the HRC has stated that the ICCPR does not prohibit double jeopardy with regard to the national jurisdictions of two or more states, but only to an offence adjudicated in a single state.¹⁴⁸⁵ Later it confirmed this position and added that “this understanding should not undermine efforts by States to prevent retrial for the same criminal offence through international conventions”.¹⁴⁸⁶

¹⁴⁸¹ ECtHR, *Marguš v. Croatia*, App. No. 4455/10, Judgment of 27 May 2014, para. 136.

¹⁴⁸² Article 20 of UN General Assembly, *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, 17 July 1998.

¹⁴⁸³ ECtHR, *Marguš v. Croatia*, Joint Concurring Opinion of Judges Ziemele, Berro-Lefèvre and Karakaş, para. 5.

¹⁴⁸⁴ *Ibid.*

¹⁴⁸⁵ HRC, *A.P. v. Italy*, Comm. No. 204/1986, CCPR/C/OP/2, 1990, para. 7.3.

¹⁴⁸⁶ HRC, CCPR General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 57.

According to this monitoring body, the prohibition does not prohibit retrial of a person convicted in *absentia* who requests it, but applies to the second conviction.¹⁴⁸⁷

It has also clarified that it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.¹⁴⁸⁸

While the HRC approach reveals tendency to interpret this prohibition narrowly and without recourse to proportionality reasoning, it has neither explicitly framed the provision as absolute, nor there is enough elaboration to draw definite conclusions regarding this matter.

Finally, Article 8, paragraph 4 of the ACHR stipulates that “An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause”.

Albeit the ACHR usually follows almost the same wording used in the ICCPR in regard to many substantial provisions, there is a remarkable difference regarding this right, indicating that the Convention does not offer the same level of protection. On the one hand, the protection is wider than the one offered under the ICCPR, which applies to the same “offense”, whereas the ACHR refers to the broader concept of “the same cause”, that benefits the person accused and prosecuted.¹⁴⁸⁹ On the other hand, nothing in the ACHR suggests that a person acquitted for the same fact in one state could not claim the protection of the *ne bis in idem* principle in another state, as is the case with the ECHR and the ICCPR.¹⁴⁹⁰ Moreover, the ACHR also seems to offer a lower level of protection compared to other international instruments, as it does not refer to conviction, but the commentators took a view that the spirit of this principle calls for the extension of the protection to cases involving a final conviction or acquittal, with high probability that the Court would affirm this reading, since it has stated that the *non bis in idem* principle “seeks to protect the rights of individuals who have been prosecuted for certain acts, to ensure that they will not be tried again for the same acts.”¹⁴⁹¹ Therefore, the provision should be understood as protecting individuals against retrials after either a conviction or an acquittal.¹⁴⁹²

Significantly for the topic at hand, the IACtHR has explicitly stated that this is not an absolute right:

“[w]ith regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an ‘apparent’ or ‘fraudulent’ *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that

¹⁴⁸⁷ *Ibid*, para. 55.

¹⁴⁸⁸ *Ibid*, para. 56.

¹⁴⁸⁹ Hennebel, Tigroudja, *The American Convention*, 361. The same in IACtHR, *J. v. Peru*, Judgment of 27 November 2013, para. 259.

¹⁴⁹⁰ *Ibid*.

¹⁴⁹¹ Hennebel, Tigroudja, *The American Convention*, 362. See also IACtHR, *J. v. Peru*, para. 259.

¹⁴⁹² *Ibid*.

make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle”.¹⁴⁹³

The same point was repeated in a later judgment, where the Court reaffirmed that “the principle of *non bis in idem* is not absolute and admits exceptions so as not to prevent the investigation of gross human rights violations, and it is not applicable when the acquittal ‘responded to the purpose of removing the accused from his criminal responsibility’ or ‘there was no real intention of subjecting the person responsible to the action of justice’, or when the ‘non-appealable judgment’ was delivered in contravention of the guarantees of competence, independence and impartiality established in Article 8(1) of the Convention”.¹⁴⁹⁴

Ultimately, commentators have suggested that the Court’s approach to this principle does involve elements of balancing, as it is stated that it would generally be overridden to uphold the interests of justice.¹⁴⁹⁵ In this regard, it is worth reminding that the IACtHR has developed firm positions on the prohibition of amnesties for grave breaches of fundamental human rights, which would otherwise undermine state’s duty to investigate and punish for such acts.¹⁴⁹⁶ These stances have been so influential that even the ECtHR has cited them in its jurisprudence.¹⁴⁹⁷

In sum, although the ACHR does provide protection against double jeopardy,¹⁴⁹⁸ it is clearly not absolute, as explicitly stated by the IACtHR. The Court has made exceptions in cases of fraudulent final decisions or where the decision-makers lacked independence and impartiality, particularly when serious human rights violations were involved, which is in line with the broader trend of rejecting amnesties for gross human rights abuses.

8. The Prohibition of Imprisonment for Inability to Fulfil a Contractual Obligation

With this, the part of the analysis concerning the potential absolute status of rights that are non-derogable across all the examined instruments comes to a close. The focus will now shift to rights that are recognised as non-derogable only in some of the treaties, which by

¹⁴⁹³ IACtHR, *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, para. 154.

¹⁴⁹⁴ IACtHR, *J. v. Peru*, para. 267.

¹⁴⁹⁵ Hennebel, Tigroudja, *The American Convention*, 362.

¹⁴⁹⁶ To cite the Court on the matter: “amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognised by International Law of Human Rights”, IACtHR, *Gomez Lund et al. v. Brazil*, Judgment of 24 November 2010, para. 171. See also IACtHR, *Gelman v. Uruguay*, Judgment of 24 February 2011, paras. 195-196.

¹⁴⁹⁷ ECtHR, *Marguš v. Croatia*, para. 138.

¹⁴⁹⁸ Interestingly enough, the African Charter does not contain an explicit provision on the principle of *ne bis in idem*, see Hennebel, Tigroudja, *The American Convention*, 361.

itself is the fact that places them in a comparatively weaker position when it comes to asserting their potential absolute status. Nevertheless, they warrant examination, as they are still afforded non-derogable protection.

First among such rights is the prohibition on imprisonment for inability to fulfil a contractual obligation.

It is set out in Article 9 of the Paris Minimum Standards, in terms identical to the ICCPR, that “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”.¹⁴⁹⁹

Although it is guaranteed under Article 1 of the Protocol No. 4 to the ECHR, in a rather unqualified terms, stating that “No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation”, without any limitation clause or exceptions, it has not been proclaimed non-derogable. Hartman suggested that this may be due to the fact that it was not part of the initial text of the Convention, but was added later.¹⁵⁰⁰ However, this reasoning is not entirely convincing, since *ne bis in idem* is also absent from the original articles, yet was still made non-derogable by the additional protocol that introduced the right, hence the same could have been done with this prohibition. One could imagine several reasons why the drafters, in a post-Second World War context, may have not prioritised it. Perhaps it was overshadowed by the pressing need for the prevention of legalisation of torture, elimination of retroactive punishment or complete abolition of slavery, or perhaps it was simply thought that certain emergencies could justify its derogation. Still, whatever the rationale may have been, it is difficult to understand why the status of this right should differ under the ECHR compared to, for instance, the ICCPR.

Article 11 of the ICCPR contains almost the same provision as the ECHR, establishing that “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.” However, under Article 4 of the ICCPR, the prohibition is afforded non-derogable status, which was later also confirmed by the HRC.¹⁵⁰¹

While the Committee has deliberated on relatively few individual communications under Article 11, there is no denying that its non-derogability and unqualified phrasing make it categorical. The rationale behind its non-derogable status may simply be that it is difficult to imagine an emergency that would implicate its derogation,¹⁵⁰² or it may be grounded in the recognition that financial incapacity should not serve as a legitimate basis for imprisonment, which is a reflection of a broader principle against the criminalisation of poverty and economic vulnerability. The HRC solved this dilemma by stating that Article 11 is an example of the right that was made non-derogable “because their suspension is irrelevant to the legitimate control of the state of national emergency”.¹⁵⁰³ Any further clarity regarding this right may emerge through the further development of jurisprudence on this right or when the HRC eventually issues a general comment addressing its nature, scope and implications.

¹⁴⁹⁹ Lillich, *The Paris Minimum Standards*, 1080.

¹⁵⁰⁰ Hartman, “Derogation from Human Rights Treaties in Public Emergencies”, 15.

¹⁵⁰¹ HRC, *CCPR General Comment No. 29*, para. 7.

¹⁵⁰² Hartman, “Derogation from Human Rights Treaties in Public Emergencies”, 16.

¹⁵⁰³ HRC, *CCPR General Comment No. 24*, para. 10.

The ACHR also sets out a prohibition in its Article 7, paragraph 7, specifying that “No one shall be detained for debt”,¹⁵⁰⁴ but this provision is not categorical, as it contains a pinpoint exception stating that “this principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support”. What is more, this right is not included in the second paragraph of Article 27, hence it is not non-derogable. Unfortunately, the prohibition has not been addressed by the Inter-American human rights bodies, hence no detailed analysis has been offered thus far.¹⁵⁰⁵

To sum up, there are no indications regarding its absoluteness in the stances of any of the analysed human rights bodies.

9. The Freedom of Thought, Conscience and Religion

To begin with, freedom of thought, conscience, and religion is listed as a non-derogable right under Article 8 of the Paris Minimum Standards, which reads as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; freedom of religion includes the right to hold any religion or belief or none and to change his religion or belief, and freedom, either alone or in community with others, in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair the freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, public order, health or morals or the fundamental rights and freedoms of others.

4. Every state shall respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

5. Nothing in this article shall be construed to deny to any person the right to hold no religious beliefs”.¹⁵⁰⁶

It is protected under Article 9 of the ECHR, according to which “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”. Its importance was confirmed by the ECtHR, who stated that “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention”.¹⁵⁰⁷

The second paragraph is a limitation clause, stipulating that “Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are

¹⁵⁰⁴ Once again, this prohibition is not included in the African Charter, see also Hennebel, Tigroudja, *The American Convention*, 304.

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ Lillich, *The Paris Minimum Standards*, 1080.

¹⁵⁰⁷ ECtHR, *Kokkinakis v. Greece*, para. 31

necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

Evidently, it applies only to the *forum externum* (the freedom to manifest thoughts, beliefs, and convictions) and not the *forum internum* (the freedom to internally hold them), hence the structure of the article suggests a distinction in the level of protection offered to these two dimensions of the freedom. This was also affirmed by the ECtHR, which explained that “the fundamental nature of the rights guaranteed in Article 9 para. 1. is also reflected in the wording of the paragraph providing for limitations on them”, as the limitation clause only refers to *forum externum*, and underlined that this is a recognition of coexistence of different religions in democratic societies, which requires placing restrictions in order to reconcile the interests of the various groups and ensures that everyone’s beliefs are respected.¹⁵⁰⁸

Therefore, it does not come as a surprise not only that the ECtHR observed that the first paragraph of Article 9 is “absolute and unqualified”,¹⁵⁰⁹ but also that certain scholars claimed that this internal aspect is absolute¹⁵¹⁰ and inviolable¹⁵¹¹. Even Judge Martens observed that “the basic principle in human rights is respect for human dignity and human freedom. Essential for that dignity and that freedom are the freedoms of thought, conscience and religion enshrined in Article 9 para. 1. Accordingly, they are absolute. The Convention leaves no room whatsoever for interference by the State”.¹⁵¹² In contrast, far from quiet were also those who insisted that this freedom is not absolute under ECHR,¹⁵¹³ probably owing to the fact that it is derogable under Article 15 of the ECHR.

¹⁵⁰⁸ *Ibid*, para. 33.

¹⁵⁰⁹ ECtHR, *Eweida and Others v. UK*, App. Nos. 48420/10, 36516/10, 51671/10, 59842/10, Judgment of 15 January 2013, para. 80.

¹⁵¹⁰ Paunović, Krivokapić, Krstić, *Međunarodno pravo ljudskih prava*, 191.

¹⁵¹¹ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, 2018, 584.

¹⁵¹² ECtHR, *Kokkinakis v. Greece*, Partly Dissenting Opinion of Judge Martens, para. 14.

¹⁵¹³ Hennebel, Tigroudja, *The American Convention*, 419. For instance, Greer maintained that there is nothing in Article 9 that would exclude implicit exceptions, Greer, “Constitutionalizing”, 416. A particularly intriguing question that is increasingly present in the literature relates to the definition of “belief” and, accordingly, its absolute nature. For instance, Mari Stenlund and Pamela Slotte offered a comprehensive overview of the discussion concerning the philosophy of psychiatry regarding whether delusions could be considered to be belief and whether they should be protected as such. In other words, an absolute right to hold personal thoughts and opinions would necessarily entail the same protection for what may be regarded as psychotic delusions. This is especially relevant given that there is no absolute rights to receive psychiatric treatment, whereas there is an absolute right to protect *forum internum* of the freedom of thought. Yet, in psychiatric practice, the former is prioritised over the latter. The issue is that in ethics of psychiatry and in mental health legislation, interference with the *forum internum* of this freedom is possible, through paternalistic interventions such as involuntary treatment, and justified by insufficient competence of the person at hand. This competence is linked to the ability to make autonomous decisions and a certain level of rationality that is necessary for exercising one’s rights. Therefore, from this perspective, restrictive measures could be justified insofar as their aim is to restore or increase such competence on the long run, even if it means administering temporary sedation or tranquilisers. The objective, simply stated, is to support a person in recovering rationality and complete psychological freedom. On the other hand, it may also be argued that a person has a right to be capable of experiencing emotions, imagination and affiliation through relationship with others, all of which may be jeopardised by measures relieving psychotic symptoms. See Stenlund, Slotte, “Forum Internum Revisited”, 428-441. This debate raises interesting points and deserves further elaboration by experts, particularly with regard to the meaning and content of *forum internum*, as a precondition for strengthening its protection. Nevertheless, it remains undisputable that involuntary treatment may be humiliating and thus potentially incompatible with Article 3. At the same time, the interference with psychotic individuals’ rights resulting from their treatment may be justified within the framework of limitation of rights, provided that

The right to freedom of thought, conscience and religion is guaranteed under Article 18 of the ICCPR, which in the first paragraph guarantees that “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Evidently, it also includes two aspects, the freedom to have or to adopt a religion or belief of his choice (*forum internum*), and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching (*forum externum*).

It must be noted that although religion is in the focus of Article 18, its scope is much wider, since it is said to encompass the right to freedom of thought on all matters, that is, the right to have independent thoughts, ideas, beliefs and personal convictions including the right not to have to accept political ideology or a religion with which individual disagrees, and freedom of conscience, the individual’s moral sense of right and wrong.¹⁵¹⁴ Equally important is that it also entails the right to replace current religion with another one, to become an atheist or to retain one’s religion or belief.¹⁵¹⁵ Kevin Boyle and Sangeeta Shah asserted that the mere usage of the words “religion or belief” indicated drafter’s intention to protect all beliefs and not just religious ones.¹⁵¹⁶ Their remark is in line with the stances of the HRC, which supported broader understanding of these notions and explained that Article 18 protects theistic, non-theistic and atheistic beliefs, together with the right not to profess any religion or belief.¹⁵¹⁷

Second paragraph of Article 18 prohibits coercion that would impair freedom to have or to adopt a religion or belief of choice and the HRC clarified that this also refers to the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.¹⁵¹⁸ According to the HRC, freedom from coercion protects “freedom of conscience, which, like thought, is an absolute freedom not explicitly mentioned in Article 18, paragraph 2”.¹⁵¹⁹

Article 18 is not confined to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions, and any discrimination, especially towards adherents to other religions or non-believers in case of official state religion or traditional religion that assembles most of the population, is

such measures pursue legitimate aims, such as the protection of the rights and freedoms of others, which may be applicable in cases where the patient’s behaviour is deemed unpredictable and potentially threatening to others.

¹⁵¹⁴ Kevin Boyle and Sangeeta Shah, “Thought, Expression, Association, and Assembly”, in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2014), 220.

¹⁵¹⁵ HRC, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 5. This is vital for the fact that in some Muslim countries, apostasy is even punishable, see Boyle, Shah, “Thought, Expression, Association, and Assembly”, 221.

¹⁵¹⁶ Boyle, Shah, “Thought, Expression, Association, and Assembly”, 220.

¹⁵¹⁷ HRC, *CCPR General Comment No. 22*, para. 2.

¹⁵¹⁸ *Ibid*, para. 5.

¹⁵¹⁹ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, 5 October 2021, A/76/380, para. 29.

inconsistent with Article 18.¹⁵²⁰ The HRC is particularly interested in safeguarding the right of religious minorities and Article 18 is pivotal in that regard.¹⁵²¹ On the other hand, freedom of religion does not seem to protect from disparagement of one's religion, since it must be demonstrated that the victim was personally affected by the act or omission of the State party, and the HRC found claims related to disparagement inadmissible.¹⁵²²

Final paragraph of Article 18 guarantees respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. The HRC underlined that public education including instruction in a particular religion or belief is inconsistent with Article 18 except if provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.¹⁵²³

Non-derogable status of Article 18 is explicitly afforded by Article 4, paragraph 2 of the ICCPR. Although the ambiguity surrounding the reasons certain rights were made non-derogable was already tackled in the previous chapter of this thesis, it is worth reminding that the HRC has stated that freedom of conscience, which can be read more broadly as relating to the whole *forum internum* aspect of Article 18, serves an example of a right rendered non-derogable because its derogation would be impossible.¹⁵²⁴ However, this quote can be understood not only as referring to the factual impossibility,¹⁵²⁵ as there are no technical means available yet to read or influence someone's mind, but also as suggesting that there can be no acceptable or justifiable grounds for suspending the freedom to have or to adopt a religion or belief of one's choice, or to be free from coercion which would impair this freedom.¹⁵²⁶ Put differently, this would mean that it would be impossible for a state to ever satisfy the substantive requirements for a lawful derogations, such as the proportionality test.¹⁵²⁷

Should this understanding of the non-derogable nature of Article 18 be accepted, it would lead to the interpretation of the HRC's assertion as if it indicated that impossibility to derogate from this right reflects its fundamentally important status. Fundamental nature of Article 18 is often linked to its role in protecting human dignity. The UN Special Rapporteur on Freedom of Religion or Belief has highlighted how vital *forum internum* is for

¹⁵²⁰ However, Heiner Bielefeldt remarked that even though today nearly all constitutions guarantee freedom of religion, in reality things are usually not so promising, since in many cases this freedom remains confined to a given list of religious options. Therefore, in practice members of less known, new or alternative communities are usually excluded or discriminated against. Heiner Bielefeldt, "Freedom of Religion or Belief – A Human Right under Pressure", *Oxford Journal of Law and Religion* 1, no. 1 (2012): 20.

¹⁵²¹ HRC, *CCPR General Comment No. 22*, para. 9.

¹⁵²² Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (New York: Oxford University Press, 2013), 566. See also, HRC, *Goyet v. France*, Comm. No. 1746/08, Decision of 30 October 2008, CCPR/C/94/D/1746/2008, para. 6.3.

¹⁵²³ HRC, *CCPR General Comment No. 22*, para. 6.

¹⁵²⁴ HRC, *CCPR General Comment No. 24*, para. 10.

¹⁵²⁵ Milica V. Matijević and Ana M. Zdravković, "Some Reflections on the Non-Derogable Character of Freedom of Thought, Conscience and Religion and the Concept of Absolute Human Rights", in *Савремено државно-црквено право* (Institut za uporedno pravo, 2023), 745.

¹⁵²⁶ Similar stance that the fundamental importance of the right is an underlying reason for its non-derogability can be found in Dalibor Đukić, "Vera, zdravlje, pravo: ograničenja slobode veroispovesti u uslovima pandemije", *Harmonius: Journal of Legal and Social Studies in Southeast Europe*, no. 10 (2021): 85.

¹⁵²⁷ Matijević, Zdravković, "Some Reflections", 760.

nurturing a person's stable sense of self-respect, arguing that these freedoms should be interpreted "in close analogy to the unconditional prohibition of slavery and the equally unconditional prohibition of torture".¹⁵²⁸ In a similar vein, Malcolm D. Evans has argued that freedom of thought, conscience, and religion is just as fundamental to a person's well-being as the prohibition of torture, and for that reason, deserves an "elevated status" beyond the reach of restrictions.¹⁵²⁹ Strikingly, he contended that if physical well-being is protected through an absolute ban on torture, it is equally reasonable to safeguard key aspects of intellectual autonomy in the same way.¹⁵³⁰ In plain words, "the freedom of thought, conscience and religion is an absolute right, which cannot be derogated from even in times of public emergency, yet the right of manifestation is, however, more circumscribed and is capable of being subject to proportionate restrictions in order to protect a range of other interests, including the rights and freedoms of others".¹⁵³¹ According to these perspectives, Article 18's non-derogable status stems from the foundational role of freedom of thought, conscience, and religion, and its exemption from derogation ultimately rests on the recognition that such freedoms are simply too essential to human dignity to ever permit suspension. The drafters of the Siracusa Principles, while addressing other ICCPR rights, echo this line of thought by noting that "the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency".¹⁵³²

Article 18 stands out as the only explicitly non-derogable right under Article 4 of the ICCPR that nevertheless contains a limitation clause in its third paragraph, which provides that only external aspect of the freedom (*forum externum*) can be limited. In words of the ICCPR, "Freedom to manifest one's religion or beliefs may be subject only to such limitations as prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

Interestingly enough, national security is not included as a permissible ground for limitation of freedom of religion, while it is part of limitation clauses found in other provisions of the ICCPR, such as freedom of expression in Article 19, assembly in Article 21 or association in Article 22. Similarly, national security is not listed in the limitation clause of the Article 9 of the ECHR, even though it is part of other limitation clauses in the same convention. The HRC insisted that limitation clause of Article 18 must be strictly interpreted, hence national security cannot be regarded as a legitimate ground for limitations.¹⁵³³ Perhaps the absence of the national security can be considered as an indication of the importance of the embodied freedom, or in other words, drafters may have intentionally excluded any possible balancing of the freedom of thought, conscience and religion against national security, as the former will always prevail when conflicting the latter. Be that as it may, Sarah Joseph and Melissa Castan also had a point when they noticed

¹⁵²⁸ UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/31/18, 23 December 2015, para. 19. Here, the Special Rapporteur refers to both Article 18, para. 2 and Article 19, para. 1.

¹⁵²⁹ Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), 317.

¹⁵³⁰ *Ibid.*

¹⁵³¹ Malcolm D. Evans, "The Relationship of Religion and Human Rights", in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (London: Routledge, 2013), 568.

¹⁵³² Lillich, *The Paris Minimum Standards*, para. 70.

¹⁵³³ HRC, *CCPR General Comment No. 22*, para. 8.

that many “national security” considerations can be justified as a limitation undertaken to achieve “public order”.¹⁵³⁴

From the foregoing, it is apparent that the individual’s freedom of thought, conscience, religion, or belief, which is the *forum internum* of the freedom must be respected by the State unconditionally. This also represents an impediment for compelling anyone to reveal their own thoughts or beliefs, for example by swearing a religious oath or carrying a religious affiliation in an identity card.¹⁵³⁵ The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.¹⁵³⁶ To borrow words from Fabienne Bretscher, “the right to have or adopt a religion or a belief, the right of parents to ensure the religious education of the children as well as the freedom from coercion are absolute rights, whose restriction cannot be justified”.¹⁵³⁷ According to Rebecca M. M. Wallace, “the absolute nature of Article 18 is endorsed by Article 4 of the ICCPR”, hence she connects absoluteness with non-derogability.¹⁵³⁸ Absolute nature of the right at hand was also confirmed by Göran Gunner¹⁵³⁹ and Hennebel and Tigroudja,¹⁵⁴⁰ while Peter G. Danchin took the view that absolute status of the *forum internum* is “further reflected in the second paragraph of Article 18, which prohibits coercion impairing the freedom to have or adopt a religion or belief of his choice”¹⁵⁴¹. He also underlined that different qualities of protection granted to two aspects of this freedom is completely in accordance with the two dimensions of religion, hence as far as religion involves actual manifestations of belief and actions, it is subject to regulation and control by the public spheres, while matters of conscience, personal belief, sentiment, and identity are inviolable freedom.¹⁵⁴² Similarly, Neuman used Article 18 as a

¹⁵³⁴ Joseph, Castan, *The International Covenant on Civil and Political Rights*, 573.

¹⁵³⁵ HRC, *CCPR General Comment No. 22*, para. 3; ECtHR, *Alexandridis v. Greece*, App No. 19516/06, Judgment of 21 February 2008; ECtHR, *Sinan Isik v. Turkey*, App. No. 21924/05, Judgment of 2 February 2010; See also Boyle, Shah, “Thought, Expression, Association, and Assembly”, 223

¹⁵³⁶ HRC, *CCPR General Comment No. 22*, para. 8.

¹⁵³⁷ Fabienne Bretscher, *Protecting the Religious Freedom of New Minorities in International Law* (Routledge, 2020), 43. It seems important to note that it is considered absolute in some national laws, such as Swedish law, where it is formally put alongside the right to life and the right not to be tortured. Joakim Nergelius, “Freedom of Religion in Sweden from a Historical Perspective”, in *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, eds. Hedvig Bernitz and Victoria Enkvist, *Swedish Studies in European Law* No. 14 (Oxford: Hart Publishing, 2020), 22.

¹⁵³⁸ Rebecca M. M. Wallace, “Religion within the Refugee Context: Squaring the Circle?”, in *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, eds. Hedvig Bernitz, Victoria Enkvist (Oxford: Hart Publishing, 2020), 198.

¹⁵³⁹ Göran Gunner, “Religious Freedom as a Human Right”, in *Freedom of Religion and Religious Pluralism*, eds. Md Jahid Hossain Bhuiyan and Carla M. Zoethout, *Studies in Religion, Secular Beliefs and Human Rights* no. 16 (Leiden/Boston: Brill Nijhoff, 2023), 89.

¹⁵⁴⁰ Hennebel, Tigroudja, *The American Convention*, 419.

¹⁵⁴¹ Peter G. Danchin, “Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law”, *Harvard International Law Journal* 49, No. 2 (2008): 260. He concluded that “the State, for example, is absolutely prohibited from proscribing membership of certain religions under law, from coercing individuals to reveal their religion without consent, or from using threats, physical force, or penal sanctions to compel individuals to adhere to or recant certain religious benefits”, *ibid*, 260-261. Similar view of the prohibition of coercion as being a confirmation of the absolute status of *forum internum* can be found in Heiner Bielefeldt, “Freedom of Religion or Belief—A Human Right under Pressure”, *Oxford Journal of Law and Religion* 1, No. 1 (2012): 22.

¹⁵⁴² Danchin, “Of Prophets and Proselytes”, 262.

nomotechnical example of a provision that expresses freedom of religious belief as an absolute right, while at the same time expresses freedom to manifest religious beliefs in practice as subject to necessary limitations.¹⁵⁴³

On the other hand, Karin Åström is of the opinion that the freedom of religion is not to be considered as a completely absolute right, because of the permissible limitations it contains.¹⁵⁴⁴ Christine Chinkin stated that in the sense of *forum externum*, the right to freedom of religion is “closer to those rights that are subject to limitations (for example in the ICCPR, freedom of movement, right to hold opinions, peaceful assembly, association) than to absolute rights (for example in the ICCPR, right to life, prohibition of torture, non-discrimination)”¹⁵⁴⁵, while Hartman found it odd that it is even non-derogable, given the broad limitation clause contained in the third paragraph of Article 18.¹⁵⁴⁶ She insisted that noticeable contradiction of a non-derogable, but limited rights is a result of a strong efforts of some delegates, alongside with the reluctance of others to appear antagonistic towards religious freedoms during the drafting process.¹⁵⁴⁷

After admitting that freedoms of *forum internum* are widely regarded as absolute and interpreted in a way that States are not only under an absolute obligation to refrain from interfering with the *forum internum* by means of religious or ideological indoctrination, “brainwashing” or other forms of manipulation, but that they also have responsibility to prevent private parties from engaging in coercive, manipulative, or fraudulent forms of indoctrination, Manfred Nowak and Tanja Vospernik revealed that they are also not so convinced in its absoluteness.¹⁵⁴⁸ Firstly, they referred to the controversial matter of proselytism in connection with the fact that conversion by Muslims to other religions is usually forbidden, which is why Muslim countries have opposed an explicit right to change one’s religion.¹⁵⁴⁹ Cited scholars pointed out the possible conflict between the right to convince others in one’s religious views with the absolute realm of *forum internum* of others and questioned whether and when State has a duty to intervene in order to protect one’s *forum internum*.¹⁵⁵⁰ They concluded that *forum internum* should only be protected in cases of improper, i.e., manipulative, fraudulent, or coercive behaviour.¹⁵⁵¹ Another restriction of *forum internum* that they identified concerns the last paragraph of Article 18, and boils down

¹⁵⁴³ Gerald L. Neuman, “Constrained Derogation in Positive Human Rights Regimes”, in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge: Cambridge University Press, 2016), 19.

¹⁵⁴⁴ Karin Åström, “The Freedom of Religion in Relation to Other Human Rights”, in *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, eds. Hedvig Bernitz and Victoria Enkvist, *Swedish Studies in European Law* No. 14 (Oxford: Hart Publishing, 2020), 80.

¹⁵⁴⁵ Clare Chinkin, “Women’s Human Rights and Religion: How Do They Co-Exist?”, in *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, eds. Hedvig Bernitz and Victoria Enkvist (Oxford: Hart Publishing, 2020), 55.

¹⁵⁴⁶ Hartman, “Derogation from Human Rights Treaties in Public Emergencies”, 16.

¹⁵⁴⁷ *Ibid.*

¹⁵⁴⁸ Manfred Nowak and Tanja Vospernik, “Permissible Restrictions on Freedom of Religion or Belief”, in *Facilitating Freedom of Religion or Belief: A Deskbook*, eds. Tore Lindholm, W. C. Durham Jr, Bahia G. Tahzib-Lie (Springer, 2004), 148-149.

¹⁵⁴⁹ *Ibid.*, 149.

¹⁵⁵⁰ *Ibid.*

¹⁵⁵¹ *Ibid.*, 150.

to the right of parents to indoctrinate their children.¹⁵⁵² According to them, it imposes a restriction on the absolute right of children to adopt a religion or belief of their own choice.¹⁵⁵³ They attempted to show that even the internal freedom of thought, conscience, religion, or belief may be “subject to legitimate interference from outside” and “needs to be balanced against the rights of parents, religious leaders, missionaries, and private or public teachers”¹⁵⁵⁴.

However, they failed to consider that the absoluteness of the human right is primarily estimated regarding the relationship of the right holder *vis-à-vis* the State and that there is no right to have one’s opinion protected from attempts of others to change it. These are factual limitations of the right that should not hinder right’s absoluteness, at least not on a normative level. It should be taken as read that one’s thoughts and beliefs will be factually influenced and limited by many other external considerations, apart from parental upbringing, such as the wider community or educational background. That is not to say, however, that the right to freedom of thought is in any way legally restricted, but on the contrary, it can still remain absolute. In the context of ECHR, it was impeccably explained that the inner freedom of thought, conscience and religion implies the prohibition of treatment intended to change the process of thinking, the prohibition of any form of compulsion to express thoughts, to change opinion, or to divulge a religious conviction, as well as that no sanction may be imposed either on the holding of any view or on the change of a religion or conviction.¹⁵⁵⁵ In a nutshell, it protects against indoctrination by the State and there is no reason why the same interpretation would not be applied to the Article 18.¹⁵⁵⁶ It was also convincingly added that the obligation of children to attend education in accordance with their parents’ preferences, that do not expose them to religious or any other form of indoctrination, does not constitute an interference with the freedom of thought and conscience.¹⁵⁵⁷ Interestingly enough, while commenting on the ICCPR, Nowak later stated that “the freedom to live and act in harmony with one’s conscience enjoys the absolute protection of (private) freedom of conscience so long as these actions do not affect the rights and freedoms of others ... once they leave this sphere of privacy, as in the case of refusal to perform legal duties (e.g., duty to pay taxes or serve in the military), they are protected by Article 18 only when they represent a practice or some other form of public manifestation of a religion or a belief ... but even in this case, they are subject to the limitations found in paragraph 3”, thereby acknowledging the absolute nature of *forum internum*.¹⁵⁵⁸

Any remaining confusion regarding this matter was ultimately resolved by the UN Special Rapporteur on freedom of religion or belief, who has in several recent reports clarified that “freedom of thought, conscience, religion or belief is absolute in its internal aspect (*forum internum*)”, whereas “the manifestation of freedom of religion or belief can, in exceptional circumstances, be limited following strict tests of legality, legitimacy and

¹⁵⁵² They recognised examples of such indoctrination in baptizing babies or undertaking similar practices in non-Christian religions, *ibid.*

¹⁵⁵³ *Ibid.*

¹⁵⁵⁴ *Ibid.*

¹⁵⁵⁵ B. P. Vermeulen, “Freedom of Thought, Conscience and Religion (Article 9)”, in *Theory and Practice of the European Convention on Human Rights*, edited by Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (Intersentia, 2006), 752.

¹⁵⁵⁶ *Ibid.*

¹⁵⁵⁷ *Ibid.*

¹⁵⁵⁸ Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*, 413.

necessity”.¹⁵⁵⁹ It was explained that both the prohibition of torture and ill-treatment and the prohibition of coercion aimed at changing an individual’s religion or belief are absolute “as they do not permit any limitations”, hence that “torture and ill-treatment inflicted to coerce individuals to abandon their beliefs violate not just one but two absolute rights”.¹⁵⁶⁰

According to the Special Rapporteur, “Articles 4 and 18 of the ICCPR confirm the right’s significance, ascribing it absolute protection, even during public emergencies”, underlining that “States legally cannot ever interfere with freedom of thought”, yet that “despite its proclaimed importance and absolute nature, the right’s scope and content remain largely underdeveloped and poorly understood”, as it has attracted minimal attention across case-law, legislative texts and scholarly analyses.¹⁵⁶¹ In words of Evans, “there is often little consensus between religious believers on many moral or ethical issues and, lest it be forgotten, often an equally disparate spread of opinions between human rights thinkers on such issues too: though human rights- thinking recognises ‘absolute’ rights – including the freedom of thought, conscience and religion itself – the contours and status of even these rights continues to give rise to debate, and little is immutable”.¹⁵⁶²

An examination of the status of the freedom of thought would be incomplete without reference to Article 19 of the ICCPR, which, in the first paragraph, guarantees that “Everyone shall have the right to hold opinions without interference”. Therefore, it is inseparably connected to the freedom of thought in Article 18.

As was expected, the status of these two rights is essentially the same. First of all, the HRC took a view that this freedom is also protected unconditionally.¹⁵⁶³ Furthermore, even though Article 19 is not among non-derogable rights, the HRC has stated that, apart from explicitly non-derogable rights, it had recognised other non-derogable elements in the ICCPR,¹⁵⁶⁴ and that “freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency”.¹⁵⁶⁵ It elaborated that a right in the first paragraph of Article 19 “permits no exception or restriction”.¹⁵⁶⁶ Freedom of opinion include the right to change an opinion the prohibition of the impairment of any rights under the ICCPR based on person’s actual, perceived or supposed opinions, and ultimately, all forms of opinion are protected, such as political, scientific, historic, moral or religious.¹⁵⁶⁷

Special Rapporteur on freedom of religion or belief identified that freedom of thought and freedom of opinion are recognised as separate rights under the ICCPR, yet admitted

¹⁵⁵⁹ UN Human Rights Council, *Freedom of Religion or Belief and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur on Freedom of Religion or Belief, Nazila Ghanea*, A/HRC/58/49, 9 January 2025, para. 20.

¹⁵⁶⁰ *Ibid*, para. 41.

¹⁵⁶¹ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 4.

¹⁵⁶² Malcolm D. Evans, “The Relationship of Religion and Human Rights”, in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (New York: Routledge, 2013), 575- 576.

¹⁵⁶³ HRC, *CCPR General Comment No. 22*, para. 3.

¹⁵⁶⁴ HRC, *CCPR General Comment No. 29*, para. 13.

¹⁵⁶⁵ HRC, *CCPR General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011, para. 5.

¹⁵⁶⁶ *Ibid*, para. 9.

¹⁵⁶⁷ *Ibid*.

that distinguishing between the two can be challenging because both fall within the *forum internum*, and pointed out that some courts and scholars even treat opinion as a form of thought.¹⁵⁶⁸ The ICCPR's drafters offered little clarification on how these rights differ or overlap, simply noting that while not identical, but closely related in meaning and complementary.¹⁵⁶⁹ Maybe the most prominent view is that "thought is a process, while opinion is the result of this process".¹⁵⁷⁰

The fact that the two are often even used interchangeably is evident in the Special Rapporteur's interim report, which states that "while freedom of thought is absolute, freedom of expression can be limited" and underlines that "thought and expression are conceptually and practically distinct, yet they engage in a perpetual feedback loop in which expression is a vehicle for exchanging and developing thoughts, and thoughts feed expression".¹⁵⁷¹ Arguably, this seems as referring more to the paragraphs of Article 19, which first guarantees the unconditional freedom of opinion, and then sets out the freedom of expression in the second paragraph, restricted by the limitation clause that is outlined in the third. Accordingly, it would be more appropriate to compare freedom of opinion, rather than freedom of thought, with freedom of expression, if for no other reason than because they are both enshrined in the same article. In any event, it is obvious that if freedom of thought is absolute, then freedom of opinion must likewise be absolute. For Special Rapporteur, aside from their absolute status, little is known about the exact scope of the rights.¹⁵⁷²

In any event, both freedom of thought and freedom of opinion will come into spotlight in the near future, given the rapid pace of neuroscience developments and the emerging abilities to interfere and monitor human thought processes. Even before that, there are warnings regarding predictive technologies used by digital companies which, although cannot (yet) access actual thoughts, may threaten freedom of thought, using vast data, creating detailed psychological profiles that may infer, and in some cases even influence, individual thinking.¹⁵⁷³ As Smith correctly observed, "the right to hold an opinion and the right of free thought is absolute and almost impossible to control, but despite this, there are often allegations of 're-education' programmes used in some parts of the world which seek, in effect, to 'brainwash' individuals or groups in society".¹⁵⁷⁴ Therefore, it is only a matter of time before the absolute status of the freedom of thought and opinion is called into question, as the international community will eventually need to regulate the various forms of interference and decide whether to introduce certain exceptions. Until then, however, these rights remain absolute.

Under the ACHR, the structure of guarantees regarding these rights is somewhat different. Firstly, the right to freedom of conscience and religion is protected by Article 12, whose paragraph 1 safeguards the *forum internum*, stating that "Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change

¹⁵⁶⁸ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 21.

¹⁵⁶⁹ *Ibid.*

¹⁵⁷⁰ *Ibid.*

¹⁵⁷¹ *Ibid.*, para. 18.

¹⁵⁷² *Ibid.*, para. 25.

¹⁵⁷³ *Ibid.*, para. 68.

¹⁵⁷⁴ Smith, "The Right to Life", 306-307.

one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private".

The second paragraph makes *forum internum* inviolable, by stipulating that "No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs". This provision led scholars to conclude that *forum internum* aspect of the freedom is absolute and unconditional, as it cannot be restricted.¹⁵⁷⁵

Similarly to the ICCPR, *forum externum* is limited under the third paragraph of this Article, under the clause envisioning that "Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."

The final paragraph follows the normative scheme of the ICCPR, stipulating that "Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions".

According to Article 27 of the ACHR, Article 12 is non-derogable. Its importance was confirmed by the IACtHR, which has stated that Article 12 contains right that is one of the foundations of democratic society.¹⁵⁷⁶

As it happens, IACtHR case law interpreting Article 12 is relatively sparse and has mostly focused on a few areas, such as discrimination based on sexual orientation justified by religious beliefs and challenges to restrictions on freedom of expression linked to Article 12,¹⁵⁷⁷ hence not much on the nature of the rights has been so far said by the Court.

Article 12 should be read in conjunction with Article 13, which addresses freedom of thought and freedom of expression, providing in the first paragraph that "everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice".

The following paragraph contains a limitation clause specifying that "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the rights or reputations of others or the protection of national security, public order, or public health or morals". The trouble is that, for some reason, the limitation clause was not confined solely to freedom of expression, but appears to encompass both freedom of thought and freedom of expression, which contributes to the conclusion of some authors that freedom of thought is not absolute under the ACHR.¹⁵⁷⁸

However, even this limitation clause is restricted, as the third paragraph stipulates that "The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or

¹⁵⁷⁵ Hennebel, Tigroudja, *The American Convention*, 418.

¹⁵⁷⁶ IACtHR, "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. *Chile*, Judgment of 5 February 2001, para. 79.

¹⁵⁷⁷ Hennebel, Tigroudja, *The American Convention*, 419-420. See for instance IACtHR, Advisory Opinion OC-24/17, "Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples", 24 November 2017, para. 40.

¹⁵⁷⁸ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 20.

equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions”.

Fourth paragraph lays down that “Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence”.

Final paragraph of Article 12 requires that “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law”.

According to the IACtHR, the freedom of expression “is a cornerstone in the very existence of a democratic society”¹⁵⁷⁹, interpreting it to include the freedom to voice and disseminate ideas and freedom to receive information without unlawful or unjustified interference.¹⁵⁸⁰ Most importantly, the Court has underlined that freedom of expression is “not absolute right and may be subject to restrictions, particularly when it interferes with other rights guaranteed by the Convention”¹⁵⁸¹. Arguably, by emphasizing that freedom of expression is not absolute, the Court may have implicitly suggested that freedom of thought is. Otherwise, it would have referred to the entire first paragraph of Article 13, just as the ACHR itself does, instead of selecting only freedom of expression. However, there is one impediment for that conclusion. Article 13 is not among non-derogable right within the ACHR.

To conclude, while the ECtHR has clearly articulated absolute nature of *forum internum* of Article 9, in case of the ICCPR, the *forum internum* of freedom of thought, conscious and religion, together with freedom of opinion under Article 19, which, although not originally listed among the non-derogable rights in Article 4, was later proclaimed as such by the HRC, are beyond the reach of state interference, hence are considered absolute. In contrast, under the ACHR, only the *forum internum* of freedom of conscious and religion are said to enjoy the absolute status, whereas freedom of thought does not, as it is both restricted by the limitation clause and derogable.

10. The Right to Juridical Personality

To start, the first right that the Paris Minimum Standards lists as non-derogable is the right to legal personality, providing that “Everyone shall have the right to recognition everywhere as a person before the law”.¹⁵⁸²

Since the right to juridical personality is not included in the ECHR, it is not among non-derogable rights of this treaty, hence its status was not extensively discussed in the

¹⁵⁷⁹ IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment of 22 June 2015, para. 140.

¹⁵⁸⁰ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 20.

¹⁵⁸¹ IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 144.

¹⁵⁸² Lillich, *The Paris Minimum Standards*, 1075.

jurisprudence of the ECtHR.¹⁵⁸³ Interestingly enough, Judge Vučinić criticised the Court for not admitting sufficient weight to the violation of this “absolutely fundamental right”.¹⁵⁸⁴

The situation is completely different under the ICCPR, which Article 16 affirms that “Everyone shall have the right to recognition everywhere as a person before the law” and it is proclaimed non-derogable under Article 4. Nowak recognised legal personality as a necessary prerequisite to all other rights of the individual, underlining that:

“[i]t is one of the individual’s rights of existence. In addition to physical and spiritual existence, the individual in a State governed by the rule of law also requires the recognition of his or her existence before the law, that is, of his or her *legal subjectivity*. Without this right, the individual could be degraded to a mere legal object, where he or she would no longer be a person in the legal sense and thus be deprived of all other rights, including the right to life”.¹⁵⁸⁵

Although this right has not yet been subject of a specific General Comment of the HRC, nor has the Committee addressed it extensively and has even been criticised for inconsistent application of Article 16, keeping it at the level of decorative, rather than real value,¹⁵⁸⁶ there are nevertheless a few important positions worth highlighting.

For instance, the HRC has recognised that members of particularly vulnerable groups are in special need of protection under Article 16. In that context, it is relevant to remind of the HRC’s stance that this right “is particularly pertinent for women” and that it implies that “the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground”, as well as that they “may not be treated as objects”.¹⁵⁸⁷

More importantly for the topic at hand, in the context of forced disappearance, the HRC explained that “intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognise that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of their relatives to obtain access to potentially effective remedies, including judicial remedies have been systematically impeded. In such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to

¹⁵⁸³ However, the ECtHR did recognise this right in its case-law regarding Article 8 of the ECHR, see for instance, ECtHR, *Kurić and Others v. Slovenia*, App. No. 26828/06, Judgment of 26 June 2012, para. 356. However, Article 8 is a limited, derogable right, that cannot be considered absolute under the ECHR. This was also confirmed by the ECtHR, although with regard to another aspect of the Article 8, namely the confidentiality of communications, when it stated that “such a guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others”, see ECtHR, *Podchasov v. Russia*, App. No. 33696/19, Judgment of 13 February 2024, para. 65.

¹⁵⁸⁴ ECtHR, *Kurić and Others v. Slovenia*, Partly Concurring, Partly Dissenting Opinion of Judge Vučinić.

¹⁵⁸⁵ Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*, 369.

¹⁵⁸⁶ Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020), 457.

¹⁵⁸⁷ HRC, *CCPR General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, para. 19.

recognise such victims as persons before the law”.¹⁵⁸⁸ This view is rather outstanding, since it indicates that Article 16 is not merely about formal status, but also about the practical capacity of a person to access rights and remedies within the legal system, admitting Article 16 something like a gatekeeping role, as it is a precondition for the exercise of all other ICCPR rights. Therefore, even though it has not been explicitly labelled as absolute, such status could be inferred, not only from the fact that it is a non-derogable right containing no limitations or exceptions, but also from the way the HRC frames it, treating it as a necessary condition for the enjoyment of all other rights. Put differently, if this foundational, prerequisite right were not absolute, then it would be difficult to sustain the absoluteness of any other right.

The right to juridical personality is enshrined in the Article 3 of the ACHR, stating that “every person has the right to recognition as a person before the law” and it is non-derogable under this Convention. The IACtHR interpreted it as guaranteeing everyone the right “to be recognised everywhere as a person having rights and obligations, and to enjoy the basic civil rights”, which further “implies the capacity to be the holder of rights (capacity and exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligation”.¹⁵⁸⁹

According to scholars, the importance of the right is indicated by the fact that Article 3 is one of the first articles of the ACHR, placed even before the protection of the right to life and the right to a humane treatment. The IACtHR has also admitted this right great significance, for instance, by claiming that “the failure to recognise juridical personality harms human dignity, because it denies absolutely an individual’s condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals”.¹⁵⁹⁰ This logic has been reiterated in the subsequent cases of the Court, especially those involving forced disappearance, which is a bright example of evolutive interpretation.¹⁵⁹¹ For instance, given that central aspect of a forced disappearance is that the victim is effectively removed “outside the protection of the law”, the Court acknowledged that this results in the person being deprived of the capacity to hold or exercise human rights.¹⁵⁹² The Commission went even further, asserting that “the persons who were detained and then disappeared ‘were excluded from the legal and institutional framework of the State’, which constituted the negation of their very existence as human beings recognised as persons before the law”, and as a result, it has declared the violation of Article 3 of the Convention.¹⁵⁹³

The Court, did, however, state that “disregarding the juridical personality would be equivalent to the absolute denial of the possibility that a human being could have title to rights and obligations”, as otherwise “he would be treated as an object – the matter of a

¹⁵⁸⁸ HRC, *Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche. v. Algeria*, Comm. No. 1328/ 2004, Views of 10 July 2007, CCPR/C/90/D/1328/2004, paras. 7.8. The same stance was repeated in HRC, *Grioua v. Algeria*, Comm. No. 1327/ 2004, Views of 10 July 2007, CCPR/C/90/D/1327/2004, para. 7.8 and HRC, *Zohra Madoui and Menouar Madoui v. Algeria*, Comm. No. 1495, Views of 28 October 2008, CCPR/C/94/D/1495/2006, para. 7.7.

¹⁵⁸⁹ IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, para. 179.

¹⁵⁹⁰ IACtHR, *Girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005, para. 179.

¹⁵⁹¹ Hennebel, Tigroudja, *The American Convention*, 125.

¹⁵⁹² IACtHR, *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, para. 101.

¹⁵⁹³ *Ibid*, para. 99.

juridical relation, not the subject of it - or he would be reduced to the condition of slave",¹⁵⁹⁴ thereby indicating the foundational importance of this right in any legal system.

To sum, states are under the obligation to provide all means and legal conditions for free and full enjoyment of this right,¹⁵⁹⁵ and among those means is also nationality, which the Court considered to be "a prerequisite for recognition of juridical personality"¹⁵⁹⁶. In that context, the Court found that stateless persons, *ex definitione*, lacks recognised juridical personality because they have no juridical and political connection with any state.¹⁵⁹⁷ Hence, enabling birth registration is a necessary guarantee under this right, and in cases where the state refused to issue it to persons born on the territory of a state, the Court found a violation of Article 3.¹⁵⁹⁸

In the same vein as the HRC, the IACtHR has not yet declared the right to be absolute, but both the text of the Convention and its case-law suggest that the right is not subject to restrictions, as it is non-derogable, has no limitation clause and it is constructed in unqualified terms, without room for balancing against competing interests. In addition, the Court has affirmed that this right is essential to human dignity and linked it closely to the prohibitions on torture, slavery, and forced disappearance,¹⁵⁹⁹ indicating that its denial represents an annihilation of legal subjectivity, hence it can be concluded that the right is practically treated as absolute.

After all, although the African Charter does not recognise non-derogable rights, it is worth noting that the treaty guarantees the right to recognition of legal status within the same Article 5 that also prohibits slavery and torture, cruel, inhuman or degrading punishment and treatment, suggesting that these rights are afforded the same level of protection and have the same status.

11. Rights of the Family

Rights of family found their place as non-derogable within Article 11 of the Paris Minimum Standards, which provides that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution".¹⁶⁰⁰ The following paragraph stipulates that "Marriage shall be entered into only with the free and full consent of the intending spouses", and the final paragraphs states that "The family is the natural and fundamental unit of society and is entitled to protection by society and the state".¹⁶⁰¹

¹⁵⁹⁴ IACtHR, *Bámaca Velásquez v. Guatemala*, para. 14.

¹⁵⁹⁵ IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, para. 249.

¹⁵⁹⁶ IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 178.

¹⁵⁹⁷ *Ibid.*

¹⁵⁹⁸ *Ibid.*, para. 3.

¹⁵⁹⁹ See Taylor, *A Commentary on the International Covenant on Civil and Political Rights*, 457.

¹⁶⁰⁰ Lillich, *The Paris Minimum Standards*, 1080.

¹⁶⁰¹ *Ibid.*

The only provision under the ACHR that protects a status otherwise regulated under the private law as a human right is Article 12,¹⁶⁰² which in the first paragraph defines that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.

Following is the requirement that “The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention”.

The third paragraph demands that “No marriage shall be entered into without the free and full consent of the intending spouses”.

Moreover, “The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests”.

The final paragraph is characteristic of the ACHR, as it is not found in any of the corresponding provisions of other international human rights treaties.¹⁶⁰³ It stipulates that “The law shall recognise equal rights for children born out of wedlock and those born in wedlock”.

Furthermore, Article 12 is non-derogable only within the system of the ACHR. The underlying reason may be that the drafters placed great significance to the role of the family, probably recognizing that suspending family-related rights would do little to contribute to resolving the state of emergency.¹⁶⁰⁴ One should also consider that the region at hand experienced widespread and serious human rights violations during times of armed conflict and authoritarian rule, that were marked by the abductions of children.¹⁶⁰⁵ The IACtHR has also confirmed this non-derogable status in its case-law.¹⁶⁰⁶

However, the assumption that the suspension of family rights would never be needed during a state of emergency is not entirely persuasive. It is quite conceivable that, during some natural disaster, such as floods or pandemic, or even during the armed conflicts affecting certain regions, the state may be compelled to close parts of a city where municipal offices are located, or those areas may become physically inaccessible, or the state may simply temporarily lack the capacity to deploy its personnel to ensure that citizens can exercise, for instance, their right to marry. In such scenarios, it remains an open question whether the state should be required, at all costs and without exception, to guarantee the exercise of these rights. However, if the right is declared non-derogable, as it is under the ACHR, then such an expectation becomes binding by definition, regardless of its justification and practical implications.

In sum, Article 12 of the ACHR provides a comprehensive and uniquely detailed protection of family rights and it is only within the Inter-American system that these rights are explicitly rendered non-derogable. The drafters’ decision to insulate family rights from suspension, likely shaped by the region’s historical experience with authoritarianism and

¹⁶⁰² Hennebel, Tigrroudja, *The American Convention*, 513.

¹⁶⁰³ See Article 12 of the ECHR and Article 23 of the ICCPR.

¹⁶⁰⁴ Hennebel, Tigrroudja, *The American Convention*, 514.

¹⁶⁰⁵ *Ibid*, 514, 815.

¹⁶⁰⁶ IACtHR, *Rochac Hernández et al. v. El Salvador*, Judgment of 14 October 2014, para. 108.

systemic human rights violations, was also reaffirmed by the IACtHR. In contrast, neither the ICCPR nor the ECHR list family rights among their non-derogable provisions and this lack implies that these rights, however important, are not regarded as absolute in those frameworks.

12. The Right to a Name

Similar to rights of the family, the right to a name is non-derogable only under the ACHR.

The Paris Minimum Standards confirmed its non-derogability, in Article 12, which guarantees that “Every person has the right to a given name and the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names, if necessary”.¹⁶⁰⁷

It is not even explicitly protected under the ECHR, but the ECtHR has deliberated it within cases concerning Article 8 of the ECHR, when it held, for instance, that the parents’ right to choose their child’s first name is not unlimited and must be read in light of the child’s best interests, since the protection of the child from unsuitable name is in the public interest, hence authorities could reject registration in certain cases.¹⁶⁰⁸ In any event, as Article 8 is not only derogable, but also limited, no further discussion on potential absoluteness is needed.

The ICCPR went one step further. It does contain the right, but only with regard to the specific category of people, with its Article 24, paragraph 2 proclaiming that “Every child shall be registered immediately after birth and shall have a name”. According to the HRC, “the main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant”.¹⁶⁰⁹

Article 18 of the ACHR contains much broader provision stipulating that “Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary”. In words of the IACtHR: “it is an enforceable basic human right *erga omnes* as an expression of a collective interest of the overall international community that does not admit derogation or suspension in cases provided in the American Convention on Human Rights”.¹⁶¹⁰

So far, the IACtHR has offered only limited guidance on how the right to a name should be interpreted and applied,¹⁶¹¹ but one thing remains undisputed – this system offers the broadest protection of this right, yet with no indication of its absolute character.

¹⁶⁰⁷ Lillich, *The Paris Minimum Standards*, 1080.

¹⁶⁰⁸ ECtHR, *Guillot v. France*, App. No. 22500/93, Judgment of 24 October 1993, para. 27; ECtHR, *Johansson v. Finland*, App. No. 10163/02, Judgment of 6 September 2007, paras. 31–39.

¹⁶⁰⁹ HRC, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, para. 7.

¹⁶¹⁰ IACtHR, *Gelman v. Uruguay*, para. 123.

¹⁶¹¹ Hennebel, Tigroudja, *The American Convention*, 535.

13. Rights of the Child

Article 13 of the Paris Minimum Standards classify right of the child as non-derogable, guaranteeing that “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and a state”.¹⁶¹²

While both the ECHR and the ICCPR admit the special status to the child to some extent,¹⁶¹³ they do not envisage these rights as non-derogable. Among analysed documents, the only one that recognise their non-derogability is the ACHR, which does not come as a surprise, given the previously described historical context of this continent.

Namely, Article 19 of the ACHR provides that “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”. As expressed by the IACtHR, “cases in which the victims of human rights violations are children are particularly serious. The prevalence of the child’s superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children”.¹⁶¹⁴

Article 19 is rather indeterminate, since it does not offer the meaning of the term “child”, “measures of protection”, nor indicate exact “rights of the child” that are mentioned in the title, hence all of these notions are to be illuminated by the stances of the adjudicating bodies.¹⁶¹⁵

Non-derogability of this provision supports the normative significance of Article 19.¹⁶¹⁶ This is especially true, given the trauma encountered by the society of this region regarding various armed conflicts and regimes that used children as “means of torturing and frightening their families”.¹⁶¹⁷ However, as Hennebel and Tigroudja accurately noted, considering that the IACtHR has over time extensively interpreted the scope of children’s rights, expanding it to include economic, social, cultural and environmental rights, it remains an open question whether the prohibition of derogation applies to the full range of the rights of children.¹⁶¹⁸ That does not appear to be practically feasible or consistent with the nature and purpose of the derogation institute. In any event, there is no basis in the

¹⁶¹² Lillich, *The Paris Minimum Standards*, 1080.

¹⁶¹³ For instance, Article 5 of Protocol No. 7 to the ECHR provides equality between spouses, but requires that “this Article shall not prevent States from taking such measures as are necessary in the interests of the children”, whereas Article 24 of the ICCPR stipulates that “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”, followed by the paragraph that guarantees that “every child shall be registered immediately after birth and shall have a name” and finally, that “every child has the right to acquire a nationality”.

¹⁶¹⁴ IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 134. Particularly important for the context of gender justice is the fact that the Court has underlined that states must pay special heed to the needs and the rights of girl children, as they are members of a vulnerable group, thereby indicating its awareness of the pertaining issue of intersectional discrimination, *ibid*.

¹⁶¹⁵ Hennebel, Tigroudja, *The American Convention*, 550.

¹⁶¹⁶ *Ibid*, 552.

¹⁶¹⁷ *Ibid*, see also IACtHR, *Molina Theissen v. Guatemala*, Judgment of 4 May 2004, para. 41.

¹⁶¹⁸ *Ibid*, 552. Non-derogability under Article 27 of the ACHR is not even mentioned for instance in the IACtHR, Advisory Opinion OC-17/2002, “Juridical Condition and Human Rights of the Child”, 28 August 2002.

relevant case law of analysed regimes for these rights to be viewed as enjoying absolute status.

14. The Right to Nationality

Non-derogability of the right to nationality is confirmed by Article 14 of the Paris Minimum Standards, whose Article 14 sets out that “Everyone has the right to a nationality”, as well as that “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”.¹⁶¹⁹

While the ECHR does not include the right to nationality,¹⁶²⁰ the ICCPR guarantees it only to one category of persons, since Article 24, paragraph 3 states that “Every child has the right to acquire a nationality”. Yet, this provision is not listed as non-derogable in Article 4.

The HRC has treated statelessness with gravity, stressing that “special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality, as provided for in article 24, paragraph 3. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born”.¹⁶²¹ It follows that, although this right is undeniably significant and must be protected against discrimination in the acquisition of nationality, it does not appear to be treated as absolute by the HRC.

On the other hand, the ACHR sets out the most expansive protection of the right to nationality in its Article 20, which declares that “Every person has the right to a nationality”, followed by the paragraph which specifies that “Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality”. Finally, the last paragraph requires that “No one shall be arbitrarily deprived of his nationality or of the right to change it”.

The IACtHR clarified that the Convention “recognises both aspects of the right to nationality: the right to have a nationality from the perspective of granting the individual a minimal measure of legal protection in international relations through the link his nationality establishes between him and the State in question; and second the protection accorded the individual against the arbitrary deprivation of his nationality, without that are tied to the nationality of the individual”.¹⁶²²

From its further stances, such as the those claiming that “the determination of who has a right to be a national continues to fall within a State’s domestic jurisdiction. However, its discretionary authority in this regard is gradually being restricted with the evolution of

¹⁶¹⁹ Lillich, *The Paris Minimum Standards*, 1081.

¹⁶²⁰ The ECtHR has interpreted Article 8 to encompass aspects of nationality, for instance, by stating that “it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual”, see ECtHR, *Genovese v. Malta*, App. No. 53124/09, Judgment of 11 October 2011, para. 30.

¹⁶²¹ HRC, *CCPR General Comment No. 17*, para. 8.

¹⁶²² IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 139.

international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States”, it is evident that the right is not being protected unconditionally. On the other hand, what the Court found pivotal is that mechanisms for granting nationality must not be discriminatory, as this stems from “the peremptory legal principle of the equal and effective protection of the law and non-discrimination”.¹⁶²³ Hence, it seems that the Court has accorded greater weight to the prohibition of discrimination, potentially even treating it as enjoying absolute protection,¹⁶²⁴ than to the right to nationality.

This is not to suggest that the IACtHR did not give considerable value to this non-derogable right, especially given its recognition that nationality is not only “a prerequisite for the exercise of certain rights”,¹⁶²⁵ but also because “statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability”.¹⁶²⁶ It is also worth recalling how the Court underlined the interconnectedness of human rights, in this case particularly the right to juridical personality and the right to nationality, insisting that “a stateless person, *ex definitione*, does not have recognised juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality”.¹⁶²⁷

Thus, although formally non-derogable only under the ACHR, the right to nationality is increasingly viewed by monitoring bodies as indispensable to the exercise of other rights, especially in contexts of statelessness, that threatens human dignity, but it is not considered absolute.

15. The Right to Participate in Government

According to Article 15 of the Paris Minimum Standards, the right to participate in government is non-derogable and reads as follows:

“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”.¹⁶²⁸

Although political rights are not included in the original text of the ECHR, Article 3 of Protocol No. 1 obliges states to “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. However, this provision is derogable under Article 15 of the ECHR and more importantly, the ECtHR has declared outright that “the rights bestowed

¹⁶²³ *Ibid*, para. 141.

¹⁶²⁴ Such a stance could be found in Hennebel, Tigroudja, *The American Convention*, 616.

¹⁶²⁵ IACtHR, *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014, para. 253.

¹⁶²⁶ IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 142.

¹⁶²⁷ *Ibid*, para. 178.

¹⁶²⁸ Lillich, *The Paris Minimum Standards*, 1081.

by Article 3 of Protocol No. 1 are not absolute”.¹⁶²⁹ The Court followed this statement by some sort of explanation, claiming that “there is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere”.¹⁶³⁰

Article 25 of the ICCPR, which served as a direct inspiration for Article 23 of the ACHR,¹⁶³¹ stipulates that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; to have access, on general terms of equality, to public service in his country”. Unlike Article 25 of the ICCPR, Article 23 of the ACHR is non-derogable, once again, probably in order to enhance fundamental importance of democratic participation and reflecting the experience of dictatorship that these states have endured for several decades.

Article 23 contains two paragraphs, with the first providing that “Every citizen shall enjoy the following rights and opportunities: to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and to have access, under general conditions of equality, to the public service of his country”.

The second paragraph stipulates that “The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings”.

Central to the present inquiry, the IACtHR explicitly stated that “these rights are not absolute and may be subject to limitations”.¹⁶³² This position was consistently upheld by the Court, with its recent judgment also insisting that “political rights are not absolute rights”, and adding that “their exercise may be subject to regulations or restrictions”.¹⁶³³ The IACtHR has also clarified that the power to regulate or restrict rights is not entirely left to the discretion of the state, but must meet requirements of international legal standards and the ACHR, such as those from the second paragraph of Article 23. Restrictions must also respect the principles of legality, necessity and proportionality in a democratic society,¹⁶³⁴ as typical for all restricted, relative rights.

¹⁶²⁹ ECtHR, *Hirst v. UK* (No. 2), App. No. 74025/01, Judgment of 6 October 2005, para. 60.

¹⁶³⁰ *Ibid.*

¹⁶³¹ Hennebel, Tigroudja, *The American Convention*, 690.

¹⁶³² IACtHR, *YATAMA v. Nicaragua*, Judgment of 23 June 2005, para. 206.

¹⁶³³ IACtHR, *Petro Urrego v. Colombia*, Judgment of 8 July 2020, para. 94.

¹⁶³⁴ IACtHR, *YATAMA v. Nicaragua*, para. 206. For more see Hennebel, Tigroudja, *The American Convention*, 706.

16. Judicial Guarantees Essential for the Protection of Non-Derogable Rights

The final category of rights proclaimed as non-derogable under Article 27 of the ACHR consists of judicial guarantees that are essential for the protection of non-derogable rights.

Under the Paris Minimum Standards, the right to remedy is envisaged as non-derogable, and it is laid down under Article 16, which sets out as follows:

“1. The institution of an independent and impartial judiciary is essential for ensuring the rule of law, particularly in time of emergency.

2. Judicial guarantees essential for the protection of the rights aforesaid must be secured by every state in its constitution or by law.

3. All ordinary remedies as well as special ones, such as habeas corpus or amparo, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.

4. Civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency”.¹⁶³⁵

Before embarking on the analysis of the ACHR in this regard, it is worth recalling that the ECtHR has considered that “the right to access to the courts is not absolute”.¹⁶³⁶ More elaboratively, “the ‘right to a court’, which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters”.¹⁶³⁷

Of particular relevance here is the fact that the Court has specifically deliberated on the question whether the right to remain silent during police questioning and trial is absolute. Firstly, the Court framed the dilemma through the following formulation: “what is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as ‘improper compulsion’”.¹⁶³⁸ It concluded that it is not absolute, emphasizing that a distinction must be drawn between two extremes: on the one hand, a conviction should not be solely or mainly based on the accused’s silence and on the other, the court should be allowed to take into account accused’s silence while assessing the evidence.¹⁶³⁹ Put differently, the Court indicated that a balance must be struck between these two opposing ends, thereby necessitating the application of the proportionality test, which by itself excludes absoluteness. In its later case-law, the Court

¹⁶³⁵ Lillich, *The Paris Minimum Standards*, 1081.

¹⁶³⁶ ECtHR, *Golder v. UK*, para. 38.

¹⁶³⁷ ECtHR, *Deweert v. Belgium*, para. 49.

¹⁶³⁸ ECtHR, *John Murray v. UK*, App. No. 18731/91, Judgment of 8 February 1996, para. 46.

¹⁶³⁹ *Ibid*, para. 47.

maintained the position that “the right to silence and the right not to incriminate oneself guaranteed by Article 6, para. 1 are not absolute”.¹⁶⁴⁰

Even though it is clear that judicial guarantees under the ECHR are not non-derogable, nor absolute, the Court’s analysis of the potential absoluteness of the right to silence is relevant for grasping its overall approach to this normative category.

When it comes to the ICCPR, Article 14 contains procedural guarantees in civil and criminal trials.¹⁶⁴¹ While extended the list of non-derogable rights, the HRC has explicitly mentioned deviations from fundamental principles of fair trial, including the presumption

¹⁶⁴⁰ ECtHR, *Heaney and McGuinness v. Ireland*, App. No. 34720/97, Judgment of 21 December 2000, para. 47.

¹⁶⁴¹ Article 14 stipulates that:

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to

him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

of innocence.¹⁶⁴² Unfortunately, it did not offer additional explanation. However, in its jurisprudence, the HRC did proclaim the right to be tried by an independent and impartial tribunal to be “an absolute right that may suffer no exception”.¹⁶⁴³ This was confirmed later, by stating that “the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception”.¹⁶⁴⁴ By contrast, the Committee has also clarified that “the right to defend oneself without a lawyer is, however not absolute”,¹⁶⁴⁵ hence it could be concluded that not all procedural or judicial guarantees are absolute under the ICCPR.

Back to the ACHR, explanations by the IACtHR are indispensable once more. In its own words, “since not all of [these] rights and freedoms may be suspended even temporarily, it is imperative that ‘the judicial guarantees essential for (their) protection’ remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights”.¹⁶⁴⁶

Moreover, what qualifies as “essential” judicial remedies will vary depending on the specific non-derogable rights at stake, so, for instance, the guarantees needed to protect rights related to physical integrity will differ from those required to safeguard the right to a name, even though both are considered non-derogable under the ACHR.¹⁶⁴⁷ The Court has specified that “the judicial remedies that must be considered to be essential within the meaning of Article 27(2) are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment”.¹⁶⁴⁸

Apart from “essential”, remedies must also be “judicial”, meaning “truly capable of protecting these rights”.¹⁶⁴⁹ This understanding implicitly assumes the active role of “an independent and impartial judicial body” with the authority to assess the legality of measures taken during a state of emergency.¹⁶⁵⁰

¹⁶⁴² HRC, *CCPR General Comment No. 29*, para. 11. However, the ECtHR did not consider presumption of innocence to be absolute, since it allowed states to confine presumptions of fact or of law “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”, see ECtHR, *Salabiaku v. France*, App. No. 10519/83, Judgment of 7 October 1988, para. 28.

¹⁶⁴³ HRC, *Gonzalez del Rio v. Peru*, Comm. No. 263/1987, Views adopted on 28 October 1992, CCPR/C/46/D/263/1987, para. 5.2.

¹⁶⁴⁴ HRC, *CCPR General Comment No. 32*, para. 19.

¹⁶⁴⁵ *Ibid.*, para. 37. The HRC added that “The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice”, *ibid.*

¹⁶⁴⁶ IACtHR, Advisory Opinion OC-8/87, “Habeas Corpus in Emergency Situations”, 30 January 1987, para. 27.

¹⁶⁴⁷ *Ibid.*, para. 28.

¹⁶⁴⁸ *Ibid.*, para. 29.

¹⁶⁴⁹ *Ibid.*, para. 30.

¹⁶⁵⁰ *Ibid.*

For instance, such guarantees can be found in the first paragraph of Article 25 of the ACHR, which provides that “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties”. According to the Court, this provision “gives expression to the procedural institution known as ‘amparo’” and it is designed to protect all rights, hence it is also applied to non-derogable rights,¹⁶⁵¹ serving to preserve legality in a democratic society.¹⁶⁵²

Apart from the first paragraph of Article 25, the IACtHR also took a view that legal remedies guaranteed in the sixth paragraph of Article 7 are non-derogable.¹⁶⁵³ It provides that “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies”. The Court deduced this conclusion from the fact that rule of law requires an autonomous and independent judiciary to control the legality of emergency measures, such as by examining whether a detention aligns with the legal framework established under a state of emergency, hence, the writ of habeas corpus is fundamentally important and cannot be derogated.¹⁶⁵⁴

Moreover, the Court has also held that Article 29(c) of the ACHR, which requires that no provision of this Convention shall be interpreted as “precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government”, requires that political system is supported by the judicial guarantees essential to ensure the legality of the measures taken in a state of emergency, in order to preserve the rule of law.¹⁶⁵⁵ In this regard, judicial guarantees that are “essential” and thereby not subject to suspension, “include those judicial procedures, inherent to representative democracy as a form of government (Art. 29(c)), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27(2) of the Convention and whose suppression or restriction entails the lack of protection of such rights”.¹⁶⁵⁶

In addition, due process of law, expressed under Article 8 of the ACHR, which in the first paragraph reads “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”, should be interpreted as applicable to “all the judicial guarantees”, even during the

¹⁶⁵¹ *Ibid*, para. 31.

¹⁶⁵² *Ibid*, para. 42.

¹⁶⁵³ *Ibid*, para. 44.

¹⁶⁵⁴ *Ibid*, para. 40.

¹⁶⁵⁵ IACtHR, Advisory Opinion OC-9/87, para. 37.

¹⁶⁵⁶ *Ibid*, para. 34.

state of emergency.¹⁶⁵⁷ To cite the Court on the matter, “reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees”¹⁶⁵⁸.

Finally, for the topic at hand and the overall indication of how the term “absolute right” is being utilised in practice, it is also worth mentioning the stance of the IACtHR that “the right to access to a court is not an absolute and therefore may be subject to certain discretionary limitations set by the State, the fact remains that the means used must be proportional to the aim sought”.¹⁶⁵⁹ What is more, there are also views that Article 8, paragraph 5 of the ACHR, which stipulates that “Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice”, is not “absolute in nature and cannot be interpreted categorically, since, even though it states that the criminal process must be public, it also states that it does not necessarily have to be, adding the proviso that refers to the need to protect the interest of justice”.¹⁶⁶⁰

To conclude, while not all judicial guarantees enjoy absolute protection under any of the systems examined, certain aspects of these guarantees have been attached significant weight in the jurisprudence, and some has even been explicitly recognised as absolute by the HRC.

17. Other Rights as Potential Nominees for an Absolute Status

As has already been emphasised, the list of non-derogable rights provides a useful starting point for analysing which rights may have been qualified as absolute by international human rights bodies. However, in light of the fact that this list has been expanded over time in practice, it is worth examining whether there are additional rights that may potentially enjoy such status but were not included in the initial enumerations.

One such example could be the prohibition of discrimination, given that it has already been indicated, both in the doctrine and the case-law, that this right holds an elevated normative status. Its moral significance and practical implications are not only intuitively evident, but confirmed in the practice of almost all international and national adjudicating bodies. To borrow words from Waldron, “racial discrimination is to be condemned as degrading treatment precisely because it involves the denial of this notion of the dignity of human beings as such”, the very same dignity that stems from reason and moral powers, which place humans higher than the animals and lower than the angels.¹⁶⁶¹

The Paris Minimum Standards, that aspire to ensure that the states would refrain from derogating basic human rights, interpreted freedom from discrimination as a non-derogable right within the ECHR, ICCPR and ACHR systems, stating that “All persons are equal before the law and are entitled without discrimination to the equal protection of the law”

¹⁶⁵⁷ *Ibid*, para. 29.

¹⁶⁵⁸ *Ibid*, para. 30.

¹⁶⁵⁹ IACtHR, *Cantos v. Argentina*, Judgment of 28 November 2002, para. 54.

¹⁶⁶⁰ IACtHR, *Cantoral-Benavides v. Peru*, Judgment of 18 August 2000, Separate and Partially Dissenting Opinion of Judge Fernando Vidal-Ramírez, para. 2.

¹⁶⁶¹ Waldron, *Torture, Terror, and Trade-Offs*, 309–10.

and that “There shall be no discrimination solely on ground of race, colour, sex, language, religion, nationality or social origin”.¹⁶⁶²

The prohibition is laid down in Article 14 of the ECHR, which provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”¹⁶⁶³ and in Article 1 of Protocol No. 12, which stipulates that “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”, emphasizing in the second paragraph in categorical terms that “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”. However, as already stated, it is derogable under the ECHR.

While there are no indications that the ECtHR held that the prohibition of discrimination is absolute, it is undisputed that the Court ascribed to it a “fundamental nature”, explaining that it “underlies the Convention together with the rule of law, and the values of tolerance and social peace”.¹⁶⁶⁴ The Court has clarified that “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”, underlining that states enjoy “a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law”.¹⁶⁶⁵ Therefore, the language of justification and legitimate aim is evidently the language of human rights limitations and straightforward reference to proportionality seems to exclude the logic of absolute rights from this segment of the ECHR. Similarly, Steve Foster also took a view that the prohibition of discrimination under the ECHR is not absolute, since the provision of Article 14 of ECHR has been interpreted to allow discriminatory rules or practices that have a reasonable and objective justification.¹⁶⁶⁶

Nevertheless, in a more recent case, the Court qualified racial discrimination as “degrading treatment” within the meaning of Article 3 of the ECHR,¹⁶⁶⁷ thereby indicating that over time, it is starting to comprehend this right with growing seriousness, steadily expanding its protection. Hence, it is not unimaginable that the Court may one day reframe it in absolute terms, but that is not the case yet.

¹⁶⁶² Lillich, *The Paris Minimum Standards*, 1076.

¹⁶⁶³ While Article 14 has some sort of ancillary nature, meaning that it is usually examined in conjunction with another substantive provision of the ECHR, Article 1 of Protocol No. 12 introduced a general prohibition of discrimination, as a “free-standing right”, see ECtHR, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention - Prohibition of discrimination*, 31 August 2024, paras. 3, 20.

¹⁶⁶⁴ ECtHR, *S.A.S. v. France*, App. No. 43835/11, Judgment of 1 July 2014, para. 149. See also ECtHR, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, para. 1.

¹⁶⁶⁵ ECtHR, *Inze v. Austria*, App. No. 8695/79, Judgment of 28 October 1987, para. 41.

¹⁶⁶⁶ Foster, *Human Rights and Civil Liberties*, 79-80.

¹⁶⁶⁷ See for instance ECtHR, *Abdu v. Bulgaria*, App. No. 26827/08, Judgment of 11 March 2014, para. 53.

Previous analysis has shown that, for instance, Chinkin recognised absolute rights within the ICCPR in the right to life, prohibition of torture and non-discrimination.¹⁶⁶⁸ The first paragraph of Article 2 sets out that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, while Article 26 of the ICCPR provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

However, unlike the ECtHR, the HRC explicitly stated that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁶⁶⁹ Most importantly, it held that “even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances”.¹⁶⁷⁰ It added that “in particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant”,¹⁶⁷¹ emphasizing that all derogating measures must be non-discriminatory.

Therefore, the HRC has singled out specific aspects of the general prohibition of discrimination, that it proclaimed non-derogable, such as the obligation of state parties to ensure:

- that all persons under their jurisdiction enjoy rights guaranteed under the ICCPR without discrimination (Article 2),
- the equal right of men and women to the enjoyment of all civil and political rights set forth in the ICCPR (Article 3),
- that all persons are equal before the courts and tribunals (Article 14, paragraph 1),
- equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (Article 23, paragraph 4),
- that every child has, without any discrimination, the right to protective measures that are required by his status as a minor, on the part of his family, society and the state (Article 24, paragraph 1),
- that every citizen has, without discrimination and unreasonable restrictions, the right and the opportunity to participate directly or indirectly in public affairs, to vote and

¹⁶⁶⁸ Chinkin, “Women’s Human Rights and Religion”, 55.

¹⁶⁶⁹ HRC, *CCPR General Comment No. 29*, para. 8.

¹⁶⁷⁰ *Ibid.*

¹⁶⁷¹ *Ibid.*

be elected with equal suffrage, and the equal right to access to public service in their country (Article 25).¹⁶⁷²

Ultimately, it should be recalled that within the UN system, ILC Special Rapporteur included the prohibition of apartheid and racial discrimination into its illustrative list of norms that have gained *jus cogens* status in international law, claiming that this conclusion stems from the analysis of state practice, international and national judicial decisions and scholarly writings.¹⁶⁷³

However, it is regrettable that only racial discrimination was designated as *jus cogens*, while the general prohibition of discrimination, or discrimination on any other grounds, such as religious, gender, national or other, was not. It does not appear that states have ever declared racial discrimination to be more serious, or that its legal status differs from that of general prohibition of discrimination. One possible explanation for this limited designation may lie in the fact that the Special Rapporteur relied heavily on the stances of the ICJ, as only those rights that were qualified by this Court as *jus cogens*, or at least as encompassing *erga omnes* obligations, found their place within the illustrative list of *jus cogens* norms.¹⁶⁷⁴ Accordingly, since the ICJ did proclaim only the prohibition of racial discrimination to be a norm of *erga omnes* quality,¹⁶⁷⁵ as pointed out by the Special Rapporteur, other forms of discrimination were excluded from the list.¹⁶⁷⁶ Thus, the main obstacle to qualifying the general prohibition of discrimination as a peremptory norm of international law remains in that the ICJ has provided no support yet for its recognition as such.¹⁶⁷⁷ This is even more perplexing, considering that the ICJ has stated that “distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”.¹⁶⁷⁸ Nevertheless, this was obviously insufficient for the Special Rapporteur, as the qualification was not made in explicit terms.

Not surprisingly, the ACHR system went the furthest in this regard, as many times before, in line with the overall progressive approach of the ACtHR. In the doctrine, Hennebel and Tigroudja recognised that the prohibition of discrimination is absolute under Article 1, paragraph 1, which provides that “The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition” and Article

¹⁶⁷² *Ibid.*

¹⁶⁷³ UN, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 101.

¹⁶⁷⁴ Ana Zdravković, “Međunarodni sud pravde – Vladalac ili mislilac?” in *Sudstvo kao vlast*, eds. Miodrag Jovanović and Ana Zdravković (Belgrade: Centar za pravosudna istraživanja, 2020), 169.

¹⁶⁷⁵ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, para. 34.

¹⁶⁷⁶ Zdravković, “Međunarodni sud pravde”, 169.

¹⁶⁷⁷ *Ibid.*

¹⁶⁷⁸ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 131.

24 of the ACHR, which states that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”.¹⁶⁷⁹

It was already indicated that the Court has admitted greater normative value to the prohibition of discrimination than to the right to nationality, deriving it from “the peremptory legal principle of the equal and effective protection of the law and non-discrimination”.¹⁶⁸⁰ However, this is not an isolated stance of the Court, but the one that was reiterated on several occasions. For instance, the Court explained that:

“[t]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*”.¹⁶⁸¹

Furthermore, it has underlined that “the effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals”.¹⁶⁸²

Finally, in a more recent case, it has repeated that “the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens* and permeates the whole legal system”,¹⁶⁸³ basing this in the fact that both “national and international public order are based on this principle”¹⁶⁸⁴ and confirming its approach to this prohibition as warranting absolute protection.

Therefore, it can be concluded that the prohibition of discrimination has been elevated higher than the other derogable rights, at least within the systems of the ICCPR and the ACHR.

At this juncture, an additional observation deserves to be made. To begin with, in the preceding chapter, it was underscored that ICCPR employs the term “fundamental rights or freedoms of others” in its limitation clause contained in the third paragraph of Article 18, in contrast to the limitation clauses regarding the freedom to manifest one’s religion in other international instruments within the field. Furthermore, the previous analysis of case law reveals that various international bodies also make considerable use of the term “fundamental” to describe non-derogable rights, the same rights that they themselves often

¹⁶⁷⁹ Hennebel, Tigroudja, *The American Convention*, 531.

¹⁶⁸⁰ IACtHR, *Girls Yean and Bosico v. Dominican Republic*, para. 141.

¹⁶⁸¹ IACtHR, Advisory Opinion OC-18/03 “*Juridical Condition and Rights of Undocumented Migrants*”, 17 September 2003, para. 101.

¹⁶⁸² *Ibid.*, para. 110.

¹⁶⁸³ IACtHR, *Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, Judgment of 15 July 2020, para. 182.

¹⁶⁸⁴ *Ibid.*

designate as absolute. And this is particularly evident in their treatment of the prohibition of discrimination, which is previously presented, where references to this prohibition are, in both jurisprudence and academic commentary, almost invariably accompanied by the qualifier “fundamental”. Hence, it does not come as a surprise that Dembour correctly noticed that given the prevalence of utilitarian trade-offs in the human rights discipline,¹⁶⁸⁵ theorists are expectedly careful not to claim that human rights are absolute and instead, they tend to describe them as “fundamental”.¹⁶⁸⁶ Apparently, the same could be said for the human rights monitoring bodies, leading to the conclusion that the qualifier “fundamental” is at least an indication of the right’s potential absolute character, that for some reason, is not yet explicated.

Certainly, there are other rights that have been described as absolute in either doctrine or practice,¹⁶⁸⁷ which did not find their place within this chapter. Unfortunately, they did not meet some of the conditions to become part of this analysis, whether for methodological reasons or simply due to space constraints.

18. Concluding Remarks

In any event, the conducted analysis provides ample material for drawing broader conclusions about how human rights adjudicating bodies engage with the concept of absolute rights. Notably, judgments often lack doctrinal clarity, attaching rhetorical weight to the notion of absoluteness, but without providing the analytical framework necessary to define the meaning, scope and application of this very concept. As a result, the authority of such rights often relies more on declaratory language than on consistent and reasoned jurisprudence with structured argumentation. It is especially regrettable that the ECtHR, who firstly introduced the notion into the international human rights practice, and arguably, most often resorts to it, particularly regarding the prohibition of torture and other forms of ill-treatment, did not offer any kind of deeper contemplation on its understanding of this concept, its elements or practical implications, nor developed any kind of underlying doctrine. Instead, it remained at the level of bare statements or assertions, leaving broad space for doctrinal speculations and assumptions. Along those lines, several key

¹⁶⁸⁵ She limited her statement to the ECtHR, but there is no apparent reason why it would not apply to all other human rights regimes.

¹⁶⁸⁶ Dembour, *Who Believes in Human Rights?*, 102.

¹⁶⁸⁷ One such right may be, according to Nowak, the right of nationals to enter their own country under the Article 12 of the ICCPR. Nowak described this as “a de facto absolute right of residence”, see Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*, 263. What is more, the Paris Minimum Standards recognises the right to liberty, the right to a fair trial and the rights of minorities as non-derogable, but without clear indication of the basis for such conclusions, see Lillich, *The Paris Minimum Standards*, 1076-1080. Also, Chinkin recognised that there is the absolute right of all women to be free from gender-based physical, mental and sexual violence, and this is a fair point as the ECtHR does not always qualify domestic violence cases as following under the scope of (absolute) Article 3 of the ECHR, but sometimes only invokes (restricted) Article 8 of the ECHR. See, Chinkin, “Women’s Human Rights and Religion”, 67. See also Bojana Čučković, “Uticaj Istanbulske konvencije na standarde Evropskog suda za ljudska prava – pozitivna obaveza zaštite žrtava kao element osnovnih ljudskih prava,” u *Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici – deset godina primene* (ur. Ivana Krstić), Pravni fakultet Univerziteta u Beogradu, 2024, 49–77; Ana Zdravković, „Uloga Istanbulske konvencije u tumačenju odredbe člana 3. Evropske konvencije o ljudskim pravima,” in *Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici – deset godina primene*, ed. Ivana Krstić (Beograd: Pravni fakultet Univerziteta u Beogradu, 2024), 77–97.

observations from this analysis will be highlighted and utilised in the following chapter in order to deduce and construct some sort of conceptual framework regarding absolute rights.

IV LEGAL NATURE OF ABSOLUTE HUMAN RIGHTS

If at least one conclusion may be drawn from the previous chapter, it is that the notion of absolute human rights remains very much alive in the language of international courts and quasi-judicial bodies. International bodies do not concern themselves with whether such rights exist, rather they focus on which particular rights belong to that category.

Nevertheless, the claim that there are (no) absolute human rights has animated a remarkable exchange in the scholarship. Over the past decade, several influential authors have taken up the problem in papers that grew into a running correspondence, which is an interesting occurrence in present-day academia. Different arguments passed back and forth like a relay baton, but the resulting conversation did more than just trade positions, as it revealed not only how juxtaposing moral with legal arguments may not lead to linear conclusions, but also how such discussions may still stimulate the production of useful and valuable ideas.

This chapter enters that conversation with the aim to turn a lively scholarly correspondence into a stable conceptual platform. The goal is not to drain the debate of its energy or in any way diminish its contribution to this significant topic, but to channel it to move from sparring over slogans to offering a realistic framework. With this in mind, the chapter will follow the doctrinal footprints to offer a definition of an absolute human right by specifying the criteria by which a right earns a place in this category and to demonstrate how those criteria (could) operate in law rather than in aspiration. Once that basis is settled, it will be possible to identify the rights that have in fact attained this status in contemporary human rights law.

1. The Debate of the Decade

To begin with, it was in 2011 when Steven Greer firstly challenged the conventional view that, in international human rights law, the prohibition of torture and cruel, inhuman, or degrading treatment is truly “absolute”, subject to no exceptions, limitations, restrictions, or derogations in any circumstances.¹⁶⁸⁸ Instead, he advocated for “formally unqualified rights” as being a more accurate term than “absolute”, because it purely means that there are no explicit exceptions to the rights, but still leaves room for implicit ones, or in other words, it does not indicate absoluteness in moral practice.¹⁶⁸⁹

Central to Greer’s argument was the *Gäfgen v. Germany* case, in which the ECtHR Grand Chamber ruled that threatening a suspect with torture to save a kidnapped child was a violation of Article 3, regardless of the circumstances.¹⁶⁹⁰ Interestingly enough, the ECtHR Chamber held that although the threat violated Article 3, the domestic authorities’ response,

¹⁶⁸⁸ Steven Greer, “Should Police Threats to Torture Suspects Always Be Severely Punished? Reflections on the Gäfgen Case”, *Human Rights Law Review* 11, no. 1 (2011): 67–89.

¹⁶⁸⁹ *Ibid.*, 68. For more, see Greer, “Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?”, (2018): 306; Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 232–233.

¹⁶⁹⁰ Greer, “Should Police Threats to Torture Suspects Always Be Severely Punished?”, 103. See also ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, Judgment of 1 June 2010.

including convictions and sanctions against the police, provided sufficient redress.¹⁶⁹¹ By contrast, the Grand Chamber found that the applicant remained a victim under Article 3, basing this conclusion on the leniency of the police' sentence and failure to exclude evidence obtained in breach of the ECHR.¹⁶⁹²

Greer insisted that neither law in general nor the ECHR in particular offers resolution for the type of conflict between competing Convention rights that this case involved.¹⁶⁹³

He also argued that the ECtHR's position – that Article 6 allows for balancing competing rights and interests because it is not absolute, unlike Article 3 – is difficult to justify.¹⁶⁹⁴ The right to a fair trial is, according to him, absolute in the sense that any and every trial deemed unfair breaches Article 6.¹⁶⁹⁵ However, whether a trial is unfair depends on the specific context and circumstances, and this requires assessing and weighing all relevant factors, which Greer equated with the process of determining whether some treatment qualifies as "torture," "inhuman," or "degrading" under Article 3.¹⁶⁹⁶

Criticizing the Court's conclusion, he asserted that this judgment ignored the victim's own ECHR rights.¹⁶⁹⁷ Despite the fact that the victim, Jakob, was already dead when Gäfgen was being threatened by the police, Greer maintained that, had that not been the case, it would have involved complex, multi-faceted interactions with various ECHR rights,¹⁶⁹⁸ or, put differently, that this case could easily be constructed as a case of conflict of rights.

Outlining six "asymmetries" between Gäfgen's and Jakob's rights, like the fact that more rights would have been at stake for Jakob than for Gäfgen, such as the right to life, freedom from inhuman treatment, and freedom from unlawful detention, whereas for Gäfgen it would apparently be just the freedom from inhuman treatment, Greer suggested that a morally sound resolution should consider this imbalance.¹⁶⁹⁹

Then, even if Jakob's rights weren't directly breached by the state, the state arguably failed in its positive obligation to protect them, which should be weighed in moral and legal reasoning.¹⁷⁰⁰

Thirdly, according to Greer, it was morally paradoxical that the ECHR permits killing a suspect to save a life (as one of the pinpoint exceptions), but forbids threatening him with psychological distress in violation of Article 3 to achieve the same outcome, due to its

¹⁶⁹¹ ECtHR, *Gäfgen v. Germany*, para. 109; Greer, "Should Police Threats to Torture Suspects Always Be Severely Punished?", 72.

¹⁶⁹² ECtHR, *Gäfgen v. Germany*, para. 130. Greer, "Should Police Threats to Torture Suspects Always Be Severely Punished?", 72.

¹⁶⁹³ Greer, "Should Police Threats to Torture Suspects Always Be Severely Punished?", 78.

¹⁶⁹⁴ *Ibid.*, 79.

¹⁶⁹⁵ *Ibid.*

¹⁶⁹⁶ *Ibid.*, 80.

¹⁶⁹⁷ *Ibid.*

¹⁶⁹⁸ *Ibid.*

¹⁶⁹⁹ *Ibid.*

¹⁷⁰⁰ *Ibid.*, 81.

supposed absoluteness, which precludes any exceptions under any circumstances.¹⁷⁰¹ He found it hard to understand how such a stance could be considered morally justifiable.¹⁷⁰²

Greer also emphasised the asymmetry in suffering, which undermined the justification for treating Gäfgen's brief fear as a graver concern than Jakob's extensive suffering and death.¹⁷⁰³

What is more, while Gäfgen could have immediately ended his suffering by revealing Jakob's location, Jakob had no way out, and, for Greer, the coercive element is less troubling when the suspect holds the key to ending it by fulfilling what he finds to be one's "legal and moral obligation".¹⁷⁰⁴

Finally, while acknowledging its controversial nature, Greer nonetheless highlighted distinctions in the moral worth of individuals, arguing that these should be relevant when weighing conflicting rights, for example, Jakob being an innocent child, whereas Gäfgen was a calculating, remorseful killer.¹⁷⁰⁵

In other words, Greer invoked disparities in the number of rights engaged, their legal status under the ECHR, consequences of their violations, and moral worth, to argue that Gäfgen's rights should not automatically prevail.¹⁷⁰⁶

So, he claimed that Article 3 may not be as "absolute" as it has hitherto seemed, questioning the conceptual rigidity of declaring this right absolute in every conceivable situation.¹⁷⁰⁷ Moreover, public trust in human rights may also erode when the decisions of human rights courts lack moral authority.¹⁷⁰⁸ For judicial decisions on human rights issues to be truly legitimate, they must be defensible both morally and legally, since legal human rights are essentially moral rights that have been elevated to formal legal status due to their strong moral force and close link to the most essential elements of human well-being.¹⁷⁰⁹

True as this may be, it unfortunately seems that Greer almost completely disregarded the moral background of the prohibition of ill-treatment, since it appears that he did not, or at least not explicitly, take into account the reasons why such a status is usually attributed to that right.

He concluded that cases like *Gäfgen* with their practical and moral considerations inevitably lead to trade-offs, thus he suggested that Article 3 could be legitimately outweighed by the competing Convention rights of a hostage, such as the rights to life, liberty, and protection from severe inhuman or degrading treatment, especially when the hostage is a child.¹⁷¹⁰ He asserted that the Court should abandon its "head in the sand" formalism, which prevents moral reasoning from guiding its interpretation and leads to

¹⁷⁰¹ *Ibid*, 83.

¹⁷⁰² *Ibid*, 84.

¹⁷⁰³ *Ibid*.

¹⁷⁰⁴ *Ibid*.

¹⁷⁰⁵ *Ibid*, 84-85.

¹⁷⁰⁶ *Ibid*, 80-85.

¹⁷⁰⁷ *Ibid*, 87-88.

¹⁷⁰⁸ *Ibid*, 88.

¹⁷⁰⁹ *Ibid*, 87.

¹⁷¹⁰ *Ibid*, 88.

morally perverse outcomes.¹⁷¹¹ An exception for extreme hostage-rescue cases, Greer argued, would not open the door to routine abuse, as he set out strict conditions for its application, namely, that there must be virtual certainty that the suspect is involved in the abduction, that the hostage will suffer severe inhuman and degrading treatment, facing an imminent risk of death unless rescued immediately, that the suspect possesses information that could facilitate the rescue, and that any coercion by law enforcement must be limited to the threat, rather than the use, of torture or other ill-treatment and such a threat should only be made after all other options have been exhausted and failed.¹⁷¹² Peculiarly enough, he also proposed that those responsible should be formally, albeit leniently, punished, a seemingly paradoxical condition that, despite its moral inconsistency, may be more acceptable than the heightened risk of suspect abuse in police custody that could arise without it.¹⁷¹³

* * *

With all this in mind, it comes as no surprise that several scholars were prompted to respond to these stances. In his reply to Greer, Smet critically examined whether conflicts between absolute rights are possible under the ECHR, ultimately arguing that such conflicts may arise but must be approached with a more principled legal and moral framework.¹⁷¹⁴

He began by rejecting Greer's claim that *Gäfgen v. Germany* involved a genuine conflict between two absolute rights, arguing instead that the case concerned Gäfgen's absolute negative right under Article 3 and the victim's positive right to life, which is not absolute under the ECHR or the Court's jurisprudence, neither in its negative dimension, due to (pinpoint) exceptions, nor in its positive dimension, as it only arises when certain requirements are met.¹⁷¹⁵

Smet approved of the ECtHR's finding that Article 3's absolute nature rules out any justification for ill-treatment, even when intended to protect life.¹⁷¹⁶ To analyse a genuine conflict between absolute rights, he constructed a case of X in which the state faces a simultaneous negative obligation not to torture X and a positive obligation to protect a child, Z, from torture by a third party, Y, who is X's wife – both obligations arising under Article 3 of the ECHR.¹⁷¹⁷ When X refuses to disclose Z's location, the police resort to torturing him in an effort to save the child.¹⁷¹⁸ Regardless of whether X ultimately reveals the information, Smet was convinced that the situation illustrates a potential conflict between absolute rights:

¹⁷¹¹ *Ibid.*

¹⁷¹² *Ibid.*, 88-89.

¹⁷¹³ *Ibid.*, 89.

¹⁷¹⁴ Stijn Smet, "Conflicts between Absolute Rights: A Reply to Steven Greer," *Human Rights Law Review* 13, no. 3 (2013): 475.

¹⁷¹⁵ Smet cited the Court stating that "where there is an allegation that the authorities have violated their positive obligation to protect the right to life ... it must be established ... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual ... and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk", ECtHR, *Osman v. UK*, App. No. 23452/94, Judgment of 28 October 1998, para. 116. See Smet, "Conflicts between Absolute Rights", 474.

¹⁷¹⁶ *Ibid.*, 475.

¹⁷¹⁷ *Ibid.*

¹⁷¹⁸ *Ibid.*

the state's duty to refrain from torturing X versus its duty to protect Z from torture by another.¹⁷¹⁹

The following step was to examine whether both the negative and the positive dimensions of Article 3 are truly absolute, and he concluded that the ECtHR treats both as absolute, as shown in expulsion and domestic abuse cases, where no balancing with competing interests is allowed.¹⁷²⁰

In contrast to Greer's *ad hoc* moral reasoning, which evaluated the moral worth of the parties and allowed for exceptions to Article 3, Smet proposed a principled approach grounded in moral philosophy and in line with the ECtHR case law, noting that none of the Court's existing tests offer guidance on how to resolve the X dilemma, with the ultimate aim of translating moral argument into a legal test applicable in practice.¹⁷²¹

Drawing on the Trolley Problem,¹⁷²² he considered several possible moral responses and rejected most of them, including the distinction between the "moral non-innocence" of a victim and the "moral guilt" of the perpetrator—a distinction reflected in Greer's assessment of the differing moral worth of each party.¹⁷²³ Smet argued that using a moral nullifier in this manner contradicts established ECtHR case law, which has made it clear that the behaviour of the individual being tortured by state agents is irrelevant to the state's responsibility.¹⁷²⁴

He relied on the belief that the moral judgment of most people would be that "in principle the negative obligation (not to take life) weighs heavier than the positive obligation to save life".¹⁷²⁵ That is to say, in cases of conflict between absolute rights, negative obligations should generally trump positive obligations, since the former require inaction and the latter require action.¹⁷²⁶ Still, he allowed for the possibility that, in certain specific circumstances, adherence to the negative obligation could be balanced against positive obligations, for instance, if doing so would save significantly more lives.¹⁷²⁷ However, he did not provide any guidance on how such a balancing exercise should be conducted.¹⁷²⁸

An additional argument for his position was drawn from the Kantian idea that "using a person as a means to an end (direct agency) is morally worse than acting in a manner that respects the status of a person as an end in herself, but which nevertheless results in her death (indirect agency)".¹⁷²⁹ He argued that if fulfilling a positive obligation involves using individuals merely as a means to an end, thus violating their inherent dignity, no balancing

¹⁷¹⁹ *Ibid.*

¹⁷²⁰ *Ibid.*, 478-480.

¹⁷²¹ *Ibid.*, 481-483.

¹⁷²² See Phillipa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Oxford: Basil Blackwell, 1978), 23; Judith Jarvis Thomson, "The Trolley Problem" *Yale Law Journal* 94 (1985): 1395-1415.

¹⁷²³ Smet, "Conflicts between Absolute Rights", 489.

¹⁷²⁴ *Ibid.*, 490.

¹⁷²⁵ *Ibid.*, 492. Of course, he clarified that this does not apply to situations where other factors are not equal, for example, when lethal force is used in self-defence or to protect another person from a violent attacker, *ibid.*

¹⁷²⁶ *Ibid.*, 491.

¹⁷²⁷ *Ibid.*, 494.

¹⁷²⁸ *Ibid.*

¹⁷²⁹ *Ibid.*

of rights is permissible, as the act itself is morally unacceptable regardless of potential benefits to others.¹⁷³⁰ Allowing a balancing exercise under these conditions would undermine the fundamental inviolability of the individual.¹⁷³¹ On the other hand, if the positive obligation can be met without instrumentalizing anyone, balancing of rights may be justified, potentially allowing for the duty to the many to outweigh the duty to the few.¹⁷³² Therefore, negative obligations may be overridden through a balancing exercise, but only when the harm arises through indirect agency.¹⁷³³ And this is why he considered Greer to be mistaken – in Greer’s account, the police treat Gfgen as a means to an end by threatening him with torture, thereby breaching the Kantian principle, while refraining from threatening Gfgen would not compromise Jakob’s status as an end in himself.¹⁷³⁴

Smet insisted that his proposal should be applied only when conventional legal reasoning fails to resolve hard cases.¹⁷³⁵ To recapitulate, his legal principle has two steps: first, negative rights generally take precedence over positive rights when the same absolute right is in conflict, and second, balancing is only permissible if the interference involves indirect agency – once a person is treated as a means, balancing is ruled out.¹⁷³⁶ For Smet, it logically followed that the positive right is “less absolute” in the face of such a conflict.¹⁷³⁷

Finally, in his conclusion, he introduced an additional moral argument, asserting that ill-treatment, including the threat of it, by itself, inherently amounts to treating a person as a means to an end, thereby undermining their human inviolability, even if only temporarily, and must therefore remain absolutely prohibited.¹⁷³⁸

It must be admitted that it remains unclear why Smet came up with this additional angle at the end so abruptly. Even if accepted, and it is in itself a defensible position, it raises the question of what purpose the preceding thirty pages of his paper serve. If the conclusion is that (threat of) ill-treatment must always remain prohibited because it inherently violates human dignity, then why engage in an elaborate moral and legal framework for balancing conflicting obligations? Is the intention to apply that framework only to other types of conflicts or other rights? If so, one must ask why the same inviolability-based reasoning could not be invoked, for example, in relation to slavery, simply to assert that certain practices treat persons as a means to an end and that they are incompatible with core human values. It seems obvious that the selective application of such a moral argument has the potential to largely undermine the coherence of the broader analytical structure.

* * *

Several years later, in 2015, Greer substantially advanced and radicalised the core positions that he had previously introduced by shifting from a contextual critique of the Gfgen case to a broader challenge to the orthodoxy surrounding what he called the

¹⁷³⁰ *Ibid.*, 495.

¹⁷³¹ *Ibid.*

¹⁷³² *Ibid.*

¹⁷³³ *Ibid.*, 495-496.

¹⁷³⁴ *Ibid.*, 497.

¹⁷³⁵ *Ibid.*, 498.

¹⁷³⁶ *Ibid.*

¹⁷³⁷ *Ibid.*

¹⁷³⁸ *Ibid.*, 500.

“cardinal axiom of international human rights law”, or in other words, the absolute prohibition of torture.¹⁷³⁹

Although he acknowledged that a fundamental premise of international human rights law, shaped by the Holocaust and other atrocities of the Second World War, is that torture is inherently wrong in all circumstances, without exception, thereby rendering the right not to be tortured “absolute”, he pointed to the 9/11 attacks and their aftermath as just one of several factors prompting critical re-examination of the supposed “absoluteness” of this right.¹⁷⁴⁰

Greer argued that absoluteness is “a matter of attribution” rather than, “as orthodoxy holds, inherent legal necessity”.¹⁷⁴¹ To borrow his words, absoluteness is not “an express, inherent, self-evident, or necessary feature of the international prohibition and rights under discussion. And merely because the provisions in question are formally unqualified is not a good enough reason to regard them, or the rights they generate, as absolute”.¹⁷⁴² The basis for the absolute status of the prohibition against torture, cruel, inhuman and degrading treatment Greer recognised in “a problematic moral choice masquerading as an objective and inescapable legal imperative, supported and defended by bald assertion, blind faith, intellectual tunnel vision, and by appeals to authority rather than to reason”.¹⁷⁴³

The previously described view that threatening a suspect with torture may be morally excusable to save a victim, Greer termed “the *Gäffgen*-thesis in the narrow sense”, while “the *Gäffgen*-thesis in the broad terms” refers to the position that absolute rights can conflict, but rarely, and resolving such conflicts requires a comprehensive approach to moral reasoning, intuition, and judgment aimed at reaching the outcome that best aligns with the underlying rationale of the rights at issue.¹⁷⁴⁴ For him, it was logically impossible for two instances of the same or competing absolute right to be “equally absolute”, as one must give way for the other.¹⁷⁴⁵ His case against the absoluteness rested on several arguments, including the claim that the moral assumptions behind the absolutist position may be flawed, since torture may not be the worst form of suffering, and even if it were, that would not alone justify its prohibition in all circumstances, especially when torturing one person could prevent the torture or death of another.¹⁷⁴⁶ It was also argued that the mere inclusion of prohibitions of torture, cruel, inhuman, and degrading treatment within the same provision does not mean they should necessarily share the same status, given the differences in their nature and severity.¹⁷⁴⁷

In his response to Smet, Greer was reluctant to accept the claim that the *Gäffgen* dilemma does not represent a conflict between two absolute rights under Article 3, but a clash

¹⁷³⁹ Steven Greer, “Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?”, *Human Rights Law Review* 15, no. 1 (2015): 101.

¹⁷⁴⁰ *Ibid*, 102.

¹⁷⁴¹ *Ibid*, 101.

¹⁷⁴² *Ibid*, 134.

¹⁷⁴³ *Ibid*.

¹⁷⁴⁴ *Ibid*, 106.

¹⁷⁴⁵ *Ibid*, 106, 134.

¹⁷⁴⁶ *Ibid*, 110.

¹⁷⁴⁷ *Ibid*, 117.

between the suspect's absolute right not to be threatened with torture and the victim's non-absolute right to life under Article 2, as the Grand Chamber itself acknowledged.¹⁷⁴⁸

Challenging the relevance Smet placed on the police's motive, Greer argued that whether the authorities acted to save Jakob's life or to prevent his ill-treatment during kidnapping is irrelevant to the relationship between rights at stake.¹⁷⁴⁹

Then, he noted that only minor changes in the facts could have elevated the harm to the victim to the level of torture,¹⁷⁵⁰ which would obviously shift the dilemma to the field of absolute *versus* absolute right.

Finally, Greer once again questioned the assumption that the right to life is inherently inferior to the right not to be tortured, criticizing the absolutist position for failing to justify why threatening a suspect with torture to save a life is impermissible, while the use of lethal force against a hostage-taker is allowed when absolutely necessary.¹⁷⁵¹

Therefore, Greer maintained that the categorical elevation of the torture prohibition over the right to life rests on unconvincing normative assumptions, as seen in Smet's contribution, and thus called into question the soundness of the absolutist framework itself.¹⁷⁵²

When it comes to the differentiation between a negative obligation (not to threaten Gäfgen with torture) and a positive obligation (to rescue Jakob), while both are "absolute", Smet argued that the negative obligation is stronger, as it only requires refraining from unlawful harm, whereas the positive obligation demands reasonable, lawful rescue efforts.¹⁷⁵³ Thus, if protecting Jakob required violating Gäfgen's rights, no genuine conflict would arise—Jakob's rights depend on Gäfgen's rights are respected or not.¹⁷⁵⁴ Greer refuted this stance, claiming that the position that negative obligations always outweigh positive ones is not a solution to the problem, but its rephrasing, as well as that it is based on moral assumptions without real justification.¹⁷⁵⁵ Moreover, he insisted that the idea that positive obligations are weaker is a moral choice, not a legal truth, which needs to be backed up by real, objective reasons to justify why torturing should (not) always trump rescuing a life, without relying on the labels "negative" or "positive" obligations.¹⁷⁵⁶

At last, his response to Smet's reference to Kantian ethics is based on the assertion that the threat to torture is more of a threat to treat someone a certain way (as a means to an end) rather than itself treating them that way, with additional emphasis that such reasoning does

¹⁷⁴⁸ *Ibid*, 122.

¹⁷⁴⁹ *Ibid*.

¹⁷⁵⁰ *Ibid*, 123.

¹⁷⁵¹ *Ibid*. Greer disputed the usual distinctions drawn between these scenarios, such as the suspect's vulnerability in custody or the urgency of a siege situation, suggesting these differences are not morally decisive and he challenged the claim that torture inherently causes greater moral harm than killing, noting that both may involve humiliation and degradation, *ibid*.

¹⁷⁵² *Ibid*.

¹⁷⁵³ *Ibid*, 124.

¹⁷⁵⁴ *Ibid*.

¹⁷⁵⁵ *Ibid*.

¹⁷⁵⁶ *Ibid*, 125.

not resolve the core dilemma in *Gäffgen*-type cases but merely reframes it.¹⁷⁵⁷ He pointed out that elevating the Kantian rule to absolute status leads to further conflicts, especially when both the kidnapper and the police can be seen as violating it.¹⁷⁵⁸ Moreover, he criticised deontological ethics for offering rigid moral absolutes without clear methods for resolving conflicts and noted that rights-based theories still depend on consequences, contrary to how they are sometimes portrayed.¹⁷⁵⁹ On a larger scale, he questioned whether deontological theories are even compatible with the nature of human rights, as they, unlike deontology, prioritise rights over obligations.¹⁷⁶⁰

Finally, Greer was confident that a single exception is enough to strip a rule or principle of its absolute character, and even if every other objection to the absolutist position were convincingly answered, the *Gäffgen* thesis would still reduce the status of the prohibition and related rights from “strictly absolute” to “virtually absolute”.¹⁷⁶¹ Moreover, its broader version allows for similar, currently unforeseeable scenarios to emerge, especially since, prior to *Gäffgen* case, the human rights community did not even entertain the theoretical possibility of a conflict between two instances of the same “absolute right”, something that, Greer assured, can no longer be dismissed after this case.¹⁷⁶²

For him, it would have been more prudent and convincing if the legal authorities, who, prior to the *Gäffgen* case, had “so repeatedly, stubbornly, myopically, and unreflectively” upheld the absoluteness of the prohibition and related rights, had avoided using the term “absolute” and instead acknowledged that it is simply difficult to imagine a situation in which such treatment could ever be justified.¹⁷⁶³ Instead of relying on “the empty mantra of absoluteness”, the real task is to define strict conditions that would confine any exceptions to the most extraordinary cases.

Hiding behind “the myth of absoluteness”, Greer argued, is a way of avoiding the hard moral responsibility of deciding, when suffering is unavoidable, whose rights take priority.¹⁷⁶⁴

* * *

Mavronicola replied to Greer in 2017 by defending the legal concept of absoluteness and contending that his critiques rest on a mischaracterisation of what legal absoluteness entails, describing his vague and sweeping description as a straw man of legal absoluteness.¹⁷⁶⁵

The legal absoluteness applies specifically to state obligations and should not be conflated with moral debates about individual culpability or the permissibility of certain

¹⁷⁵⁷ *Ibid*, 126.

¹⁷⁵⁸ “On the one hand, there is the kidnapper treating his victim as a means to a ransom and, on the other, there is the police using the suspected kidnapper as a means to end, *ibid*, 127.

¹⁷⁵⁹ *Ibid*.

¹⁷⁶⁰ *Ibid*.

¹⁷⁶¹ *Ibid*, 128.

¹⁷⁶² *Ibid*.

¹⁷⁶³ *Ibid*, 136.

¹⁷⁶⁴ *Ibid*, 137.

¹⁷⁶⁵ Mavronicola, “Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law?”, 3.

actions in extreme situations.¹⁷⁶⁶ She clarified that absoluteness does not mean that torture, cruel, inhuman, or degrading treatment are never defended or committed in reality, but that the prohibition of such acts is legally non-displaceable, *i.e.*, not subject to exceptions, justification, or derogation.¹⁷⁶⁷ In other words, no justification can ever be *lawfully* invoked under international human rights law.

Central to her position is the distinction between negative obligations, such as that the state must not torture, and positive obligations, such as that the state must protect people from third-party harm, which is why she argued that Greer insisted on a false conflict between rights, as different duties are being conflated and these obligations cannot be in direct competition.¹⁷⁶⁸ Positive obligations are important but not boundless, and these are not interchangeable or in conflict, since positive obligations cannot include violating absolute prohibitions like Article 3 ECHR.¹⁷⁶⁹ For her, this represents not only the legal position, but also a morally well-founded one.¹⁷⁷⁰

Mavronicola responded to Greer's claims by arguing that he misleadingly reframed the interdependence of Jakob's and Gäfgen's rights, while in her view, Jakob's rights do trigger a broad set of positive obligations for the police, such as preventing, investigating, and punishing breaches of Articles 2 and 3 of the ECHR, and protecting individuals at immediate risk, but they do not authorise torture or ill-treatment of Gäfgen.¹⁷⁷¹

So, she was persistent that the only potential conflict lies between the state's positive duty to prevent Jakob's ill-treatment and its negative duty not to inflict ill-treatment on anyone, including the kidnapper, but, as previously noted, this and all other positive duties are rightly limited by principles of reasonableness and legality under human rights law and do not justify violating the absolute prohibition of ill-treatment.¹⁷⁷² Therefore, no real conflict exists.¹⁷⁷³

To Greer's claim that a single exception is enough to undermine the absolute nature of a rule or a principle, she zoomed in what she thought was his strongest case, and that is the hostage scenario.¹⁷⁷⁴ Namely, his claim boils down to the following: under Article 2 of the ECHR, lethal force may be lawfully used to protect hostages, but if, instead of killing the hostage-taker, police deliberately shot him in the gut, causing severe pain but not death, this could be seen as the lawful infliction of inhuman or degrading treatment.¹⁷⁷⁵ Since such suffering would typically violate Article 3, treating it as lawful in this context effectively

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ *Ibid.*

¹⁷⁶⁸ *Ibid.*, 5-6.

¹⁷⁶⁹ *Ibid.*, 5.

¹⁷⁷⁰ *Ibid.* She did not miss to highlight that Greer's position implies what Shue identified as the mistake of assuming that moral permissibility depends solely on the amount of harm inflicted, *ibid.*, see also Shue, "Torture", 126.

¹⁷⁷¹ Mavronicola, "Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law?", 6.

¹⁷⁷² *Ibid.*, 7.

¹⁷⁷³ *Ibid.*

¹⁷⁷⁴ *Ibid.*, 8.

¹⁷⁷⁵ *Ibid.*

creates an exception to the absolute prohibition, revealing a conflict of rights where Article 3 ill-treatment is deemed justified.¹⁷⁷⁶

Yet, Mavronicola pointed to the fact that this is also misleading, as torture and ill-treatment refer to specific forms of wrongful suffering that violate human dignity, whereas, the proportionate use of physical force to repel an immediate threat does not constitute torture or ill-treatment, as it respects the person's agency and does not compromise their dignity.¹⁷⁷⁷ Therefore, under human rights law, the hostage scenario reflects a more complex situation than a straightforward conflict of rights or a clear exception to the prohibition of torture and ill-treatment.¹⁷⁷⁸

In challenging his stances on "legal status as moral choice", as well as "absoluteness as a matter of attribution", she correctly remarked that Greer did not clarify what he meant by "inherent legal necessity", although his point may be apparent in the claim that the prohibition in Article 3 is "formally" unqualified and non-derogable, yet not explicitly absolute.¹⁷⁷⁹ Mavronicola reproached that absoluteness in law means exactly that—lack of qualifications and immunity from derogation and distilled several elements of absoluteness from the ECtHR's case-law:

(a) Article 3 allows no exceptions—it cannot be limited on grounds such as being 'necessary in a democratic society', unlike qualified rights like Articles 8 or 10;

(b) it is non-derogable even during war or public emergencies, as stated in Article 15; and

(c) it applies regardless of the victim's conduct, whether they are an innocent child or a convicted criminal.¹⁷⁸⁰

Put simply, "absoluteness is legal non-displaceability of a right".¹⁷⁸¹ If any of the elements is absent, the right cannot be considered absolute. This is evident in her explanation of the nature of Article 6, which is not absolute because it is "derogable under Article 15 of the ECHR", *i.e.*, displaceable in a state of emergency.¹⁷⁸² Non-derogability is, thus, a necessary, but not sufficient, aspect of the absolute character in human rights law.¹⁷⁸³ She insisted that Greer's arguments relied on the lack of total moral consensus regarding what is justified in hypothetical cases such as the "ticking bomb", which is why he should not claim that the legal prohibition should be reinterpreted as a matter of moral judgment.¹⁷⁸⁴ Catching him red-handed, Mavronicola did not fail to mention that the legal prohibition, including potential criminal liability for inflicting torture, remains part of the factual context of his scenario.¹⁷⁸⁵ Therefore, the only acceptable way of understanding his

¹⁷⁷⁶ *Ibid.*

¹⁷⁷⁷ *Ibid.*, 9.

¹⁷⁷⁸ *Ibid.*

¹⁷⁷⁹ *Ibid.*, 11.

¹⁷⁸⁰ *Ibid.*

¹⁷⁸¹ *Ibid.*, 12.

¹⁷⁸² *Ibid.*

¹⁷⁸³ *Ibid.*, 19.

¹⁷⁸⁴ *Ibid.*, 13.

¹⁷⁸⁵ *Ibid.*

position is that the legal prohibition remains absolute, while maintaining that the moral imperative against torture is not.¹⁷⁸⁶

Absoluteness is not, contrary to Greer's view, simply legal formalism, but reflects a profound commitment to protecting human dignity, even in the face of the most urgent external concerns or objectives.¹⁷⁸⁷ Human rights law exists to hold states to defined minimum standards, precisely to ensure that obligations are not left to "whatever state agents simply feel is the right thing to do" in real or perceived dilemmas.¹⁷⁸⁸

Greer further contended that because the content of Article 3 is interpreted rather than explicitly defined, its substantive boundaries are also subject to moral discretion.¹⁷⁸⁹ Mavronicola accepted the need for interpretation, as terms like "torture" are rich in moral content and can be meaningfully shaped through careful deliberation, but stressed that this must be principled and constrained, not a "displacement through the back door", or a way in for moral consequentialism, as seen in what she coined as Greer's "greater good/lesser evil balancing act".¹⁷⁹⁰ Citing Waldron, she warned against the logic that a harmful act cannot be considered inhuman or degrading because it is necessary, which is, according to her, a reasoning Greer implicitly adopts, and it is a basis of *modus tollens*:

"We are certainly not permitted to follow. . . a realist logic proceeding on the basis of *modus tollens*:

1. If X is inhuman then X is prohibited;
 2. But because X is necessary, it is unthinkable that X should be prohibited;
- therefore,
3. X cannot be regarded as inhuman".¹⁷⁹¹

The trouble is, obviously, that the second premise is not necessarily true, hence the conclusion does not necessarily stand.

Through these counterarguments, Mavronicola defended the doctrinal coherence and normative value of absolute rights, leaving them intact in international human rights law, while acknowledging that Greer's contribution may have impacted only moral discussion on the ticking-bomb scenarios.¹⁷⁹²

* * *

Mavronicola was not the only one provoked by Greer in the year of 2017. Graffin also offered a robust critique of Greer's positions on the absoluteness of Article 3 of the ECHR.

He found Greer to be right in observing that the ECtHR is reluctant to consider any potential exceptions to the rule of absoluteness—precisely because declaring Article 3 as

¹⁷⁸⁶ *Ibid*, 14.

¹⁷⁸⁷ *Ibid*.

¹⁷⁸⁸ *Ibid*, 15.

¹⁷⁸⁹ *Ibid*.

¹⁷⁹⁰ *Ibid*.

¹⁷⁹¹ *Ibid*, 16. See also Waldron, *Torture, Terror, and Trade-Offs*, 297.

¹⁷⁹² Mavronicola, "Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law?", 19.

absolute pre-empts any attempt to justify its infringement.¹⁷⁹³ Graffin underlined the fact that only in an ideal scenario absolute right is framed in a way that eliminates any uncertainty regarding its scope, as well as that there are circumstances in which certain forms of ill-treatment are regarded acceptable and are considered to fall outside the scope of Article 3.¹⁷⁹⁴

Greer's adaptation of the "ticking bomb" scenario to the Gäfgen case was also scrutinised by Graffin, who argued not only that the scenario bears little resemblance to the actual facts of the case, but also that its variations are "sufficiently fantastic to move beyond the realms of possibility" and, therefore, lack normative force to guide reasoning on this matter.¹⁷⁹⁵

As a reminder, Greer argued that framing the negative obligation as absolute and the positive as relative, as Smet did, misses the point, namely, because this distinction ultimately reflects a moral choice, rather than "the inescapable logic of absolute moral imperative", admitting that it amounts to choosing the lesser evil, while also emphasizing that Jakob's age is significant, as the duty to prevent ill-treatment is generally stronger in relation to children than adults.¹⁷⁹⁶

In his response, Graffin reminded that human rights jurisprudence does not support the view that ill-treatment could be justified to protect children, and pointed to a great number of arguments against ill-treatment of the kidnapper, such as that it requires police officers to break the law and violate their professional ethics, which is unacceptable for those tasked with upholding the legal system, that such actions would risk damaging public trust, compromising the officer's personal integrity, and undermining the broader integrity of the criminal justice system.¹⁷⁹⁷ Therefore, Graffin noted, these harms of breaching a negative obligation to ill-treatment outweigh the benefits of fulfilling a positive obligation to prevent ill-treatment.¹⁷⁹⁸ After all, Greer's argument rests on the assumption that the right not to be ill-treated necessarily had to be balanced against the rights to life and liberty, but Graffin contended that the police had alternative options available, such as to continue to question

¹⁷⁹³ Graffin, "*Gäfgen v Germany*, the Use of Threats and the Punishment of Those Who Ill-Treat During Police Questioning", 686.

¹⁷⁹⁴ *Ibid.* Graffin pointed to certain authors, such as Nowak who stated that outside detention or similar direct control, the prohibition of ill-treatment is governed by proportionality – only excessive police force violates Article 3, while in detention, it is absolute, as any force used to humiliate constitutes degrading treatment or punishment, and inflicting severe pain or suffering for a specific purpose, as defined in the CAT amounts to torture. He examined the notion of "powerlessness" as a criterion for distinguishing between contexts in which the use of force is permissible and those in which it is not, drawing from Nowak's theory that individuals under state custody should never be subject to force.¹⁷⁹⁴ While he conceded that this theory may not account for all practical necessities, such as physically relocating a non-compliant detainee, he supported the stricter application of Article 3 in the interrogation context, where psychological coercion is heightened and the potential for abuse is significantly greater. Graffin admitted that even though no single theory fully explains why harm is permissible in some situations but not others, there are various moral and policy justifications, for instance, that force may be used to prevent escape, maintain order in custody, or protect detainees and staff.¹⁷⁹⁴ However, there is no clear policy rationale for threatening suspects during police questioning, especially when standard methods are effective and powerlessness does hold particular significance in the interrogation context, where the only escape from ill-treatment may be self-incrimination or lying, *ibid.*, 686-689. See also Manfred Nowak, "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment", *Netherlands Quarterly of Human Rights* 23, no. 4 (2005): 674-678.

¹⁷⁹⁵ *Ibid.*, 691.

¹⁷⁹⁶ *Ibid.*, 693.

¹⁷⁹⁷ *Ibid.*

¹⁷⁹⁸ *Ibid.*

Gäfgen without resorting to threats and potentially achieve the same outcome.¹⁷⁹⁹ He acknowledged that this argument is a speculative one, but not more so than the claim that the police had no other choice but to breach human rights.¹⁸⁰⁰

In Greer's framework, the rights of Jakob are framed as outweighing those of Gäfgen, since Jakob's rights under Articles 2, 3, and 5 are all engaged, but Graffin rejected this quantitative approach, emphasizing that human rights cannot be ranked by the number of rights violated.¹⁸⁰¹

A particularly troubling aspect of Greer's argument, according to Graffin, is the appeal to the moral worth of the individuals involved, hence he insisted that human rights are not contingent upon character and must apply equally to all, as their purpose is to safeguard everyone and to ensure that those who are powerless receive adequate protection.¹⁸⁰²

Graffin also expressed concern about the practical consequences of allowing exceptions to the prohibition of ill-treatment, as shown in real-world examples such as Israel, Guantanamo Bay, and Abu Ghraib which demonstrated how limited exceptions can rapidly expand, eroding fundamental protections in practice.¹⁸⁰³

In conclusion, he reiterated that Article 3 remains absolute once engaged, even if not all state actions reach the threshold of its application.¹⁸⁰⁴ In the *Gäfgen* case, the key issue was not a theoretical conflict of rights but a practical failure, as the police had alternative, lawful means available and yet chose to violate Gäfgen's rights.¹⁸⁰⁵ Allowing such a breach, even in extreme cases, risks undermining the entire structure of human rights protection.¹⁸⁰⁶

Even though he offered little clarification on the meaning of absoluteness, Graffin acknowledged that his paper did not aim to challenge Greer's arguments on theoretical or procedural grounds, but rather to assess them through Greer's own moral and policy framework.¹⁸⁰⁷ He highlighted that even through a balancing test, the absolute (negative) rights prevail, as well as that the police had other options available, an aspect Greer overlooked, as his whole argument rests on the assumption that Gäfgen's ill-treatment was inevitable.¹⁸⁰⁸

* * *

In his 2018 reply to Graffin and Mavronicola, Greer revisited and defended his challenge to the commonly accepted view that the prohibition against torture, cruel, inhuman, and degrading treatment in international human rights law is absolute.

¹⁷⁹⁹ *Ibid*, 694.

¹⁸⁰⁰ *Ibid*, 694-695.

¹⁸⁰¹ *Ibid*, 695.

¹⁸⁰² *Ibid*, 695-696.

¹⁸⁰³ *Ibid*, 696.

¹⁸⁰⁴ *Ibid*, 698-699.

¹⁸⁰⁵ *Ibid*, 699.

¹⁸⁰⁶ *Ibid*.

¹⁸⁰⁷ *Ibid*.

¹⁸⁰⁸ *Ibid*.

Greer opened with a criticism of both respondents, arguing that they overlooked the majority of his arguments, relied on circular reasoning, and inadvertently conceded key points that weaken their own absolutist positions.¹⁸⁰⁹

Greer reiterated that the absolute nature of Article 3 makes the Court's uncompromising stance difficult to reconcile with the facts of the *Gäfgen* case and the practical moral dilemma it presented.¹⁸¹⁰ The central point of controversy for him lies in whether exceptions exist that could justify or excuse conduct that is contrary to Article 3, what legal status those exceptions would carry, and how individuals who engage in it under those circumstances should be treated.¹⁸¹¹ He criticised the absolutist stance for elevating the protection of a suspect, even from minor harm, over the lives or suffering of victims, as in his view, this position is underpinned not by reason, but by formalistic appeals to authority and unexamined assumptions.¹⁸¹²

He particularly contested the assumption that the absence of express limitations in Article 3 necessarily implies absoluteness.¹⁸¹³ Numerous other human rights provisions are formally unqualified but accepted as permitting implicit exceptions.¹⁸¹⁴ He repeated that if two instances of the "absolute" right, such as *Gäfgen's* and *Jakob's* respective Article 3 rights, come into conflict, it becomes logically impossible for both to remain absolute, as one must yield, undermining the very concept of absoluteness itself, and that the least harmful outcome can only be reached by allowing the "lesser of two evils" to prevail, based on a balance between the conflicting prohibitions, interests, and rights in a way that best reflects their underlying rationale.¹⁸¹⁵ He also critiqued attempts to preserve absolutism by claiming that rights are absolute "in principle" but relative in application, as this, he argued, amounts to a conceptual sleight of hand, disguising exception-making as mere threshold interpretation.¹⁸¹⁶ Therefore, to the Graffin's conception that there is a moral judgment to be made in order to decide whether something is acceptable or not for that "absoluteness" to be triggered, Greer responded by claiming that "it cannot be genuinely absolute because the occasions in which it is not triggered constitute exceptions to the relevant prohibition and rights".¹⁸¹⁷

Greer also found it hard to maintain the position that the rights and obligations at issue are legally absolute, while simultaneously claiming that *Gäfgen* case represents a rare moral exception or simply reflects a debate about what the law should be, rather than what it currently is.¹⁸¹⁸ Instead, he posited that legal norms must have minimal moral credibility, hence it is morally indefensible to claim that a legal framework insists on protecting a suspect from the threat of harm, while doing nothing to prevent the suffering or death of a

¹⁸⁰⁹ Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?", (2018): 298.

¹⁸¹⁰ *Ibid*, 298.

¹⁸¹¹ *Ibid*.

¹⁸¹² *Ibid*, 299.

¹⁸¹³ *Ibid*.

¹⁸¹⁴ *Ibid*.

¹⁸¹⁵ *Ibid*.

¹⁸¹⁶ *Ibid*.

¹⁸¹⁷ *Ibid*.

¹⁸¹⁸ *Ibid*.

victim.¹⁸¹⁹ For him it remained unclear why police may lawfully use lethal force against hostage-takers without breaching human rights, yet threatening torture to save lives must always be punished, as the claim that such threats violate dignity while killing does not, raise an unanswered and unconvincing distinction.¹⁸²⁰ The assessment that the prohibition is absolute only for state agents but not for private individuals was untenable for Greer, as it implies implicit exceptions and fails to address scenarios where both parties hold competing Article 3 rights.¹⁸²¹ Prioritising the state's duty not to harm suspects over its duty to protect victims, or framing the issue as one of inherent moral wrongs, simply reframes rather than resolves the dilemma.¹⁸²² Without independent and convincing justification for this hierarchy of obligations, Greer was certain that the absolutist stance remains unsubstantiated.¹⁸²³ Finally, he emphasised that the *Gäfgen* case shows that relying solely on legal formalism and logic to address complex issues risks elevating human-made rules to near-sacred status, while avoiding the need for morally intuitive, emotionally compelling, and rationally defensible choices in resolving difficult ethical dilemmas.¹⁸²⁴

So, he criticised Mavronicola's reliance on this distinction between negative and positive obligations as resting on circular reasoning, since it "assumed the absoluteness of the prohibition in order to demonstrate its absoluteness".¹⁸²⁵

On the issue of dignity and agency, Greer is similarly sceptical, questioning how a temporary threat could be deemed more degrading than causing permanent disability through the use of lethal force.¹⁸²⁶

It seemed very important to him to repeat that law and morality cannot be separated in the context of human rights, since legal prohibitions are imbued with moral meaning, hence legal interpretation must be guided by moral reasoning.¹⁸²⁷

Greer's conclusion was that the absolutist camp is gradually conceding ground, as both Graffin and Mavronicola entertained notions of leniency, flexibility in interpretation, and threshold conditions for triggering Article 3, all of which dilute its supposed absoluteness.¹⁸²⁸ Therefore, Greer insisted that "it is widely recognised that rights implied by formally unqualified imperatives or prohibitions may be subject to implicit exceptions", that moral judgment, instead of rigid formalism, must guide action in hard cases of conflict

¹⁸¹⁹ *Ibid*, 300.

¹⁸²⁰ *Ibid*.

¹⁸²¹ *Ibid*.

¹⁸²² *Ibid*.

¹⁸²³ *Ibid*.

¹⁸²⁴ *Ibid*, 301.

¹⁸²⁵ *Ibid*, 303.

¹⁸²⁶ *Ibid*. Greer further accused both Graffin and Mavronicola of undermining their own absolutist framework by accepting that leniency in punishment might be appropriate in certain extreme cases, since if the right is truly absolute, then any breach must warrant equally severe consequences, otherwise, the absolutist position collapses under the weight of its own internal inconsistencies. He also disputed the suggestion that the procedural obligation to punish offenders is separable from the substantive prohibition itself, arguing that failure to properly sanction violations renders the prohibition effectively hollow, *ibid*, 304.

¹⁸²⁷ *Ibid*, 305.

¹⁸²⁸ *Ibid*, 306.

of rights in order to achieve the least bad outcome that best reflects the core purpose of the prohibition, rights, and obligations, while also enhancing their overall effectiveness.¹⁸²⁹

Ultimately, his suggestion was that the term “absolute” should be dropped entirely from human rights discourse.¹⁸³⁰ Although he anticipated that courts and scholars may ignore the anti-absolutist position, Greer was confident that the debate has irrevocably shifted, as the “genie is now out of the bottle”, and no one, including his critics, has yet found a convincing way to return to the pre-Gäfgen absolutist orthodoxy.¹⁸³¹

* * *

To summarise, from the outset, it is apparent that the debate revolved more around the question of whether absolute rights exist than around their definition, even though the issue of their determination was an inevitable one, addressed both directly and indirectly. Beyond the fact that these aspects of the discussion are highly relevant for this thesis, the whole conversation has an additional value for a broader theoretical context, as it clearly shows that in structured discussions moral and legal arguments should not be crossed or conflated. These are tools from two different, albeit complementary, domains, but combining them in the manner used here obviously does not yield a logically coherent or practically valuable result.

Even though Greer was right in his position that “law and morality cannot be separated in the context of human rights, since legal prohibitions are imbued with moral meaning”, which is why “legal interpretation must be guided by moral reasoning”,¹⁸³² interchangeably mixing moral and legal perspectives is not proven to be an adequate argumentative technique. This is because, to borrow Greer’s phrase again, the result of that mix may divorce the debate from reality,¹⁸³³ as seen in many examples of arguments presented in this thesis, primarily with regard to the ticking bombs and terrorists.

Truth be told, there is no clear boundary between what counts as a moral argument and what should be considered a legal argument, but tentatively it can be said that moral arguments answer to ethical principles and concern what one ought to do in terms of what is right or wrong from the standpoint of values, whereas legal arguments are based on interpretation of legal sources. Nevertheless, it still holds that the domain of law is broader than that of morality and that moral critique is indispensable to evaluating the law, particularly in fields devoted to protecting human dignity, such as human rights.

So, for instance, Greer relied on morality when he assessed that permitting killing a suspect to save a life but not permitting ill-treatment in the form of psychological distress could not be considered justifiable.¹⁸³⁴ The issue here is obviously against what background should that justifiableness be evaluated? What is the ultimate value? Similarly, his invoking of the moral worth of the individual is a purely moral perspective,¹⁸³⁵ that not only is alien

¹⁸²⁹ *Ibid.*

¹⁸³⁰ *Ibid.*

¹⁸³¹ *Ibid.*, 307.

¹⁸³² *Ibid.*, 305.

¹⁸³³ *Ibid.*

¹⁸³⁴ For this argument see Greer, “Should Police Threats to Torture Suspects Always Be Severely Punished?”, 84.

¹⁸³⁵ *Ibid.*, 84-85.

to the overall human rights law rationale, as its starting premise is that everyone, by virtue of being human, is entitled to all human rights and freedoms,¹⁸³⁶ but also is irrelevant for the legal institute of state responsibility for breaching human rights, as Smet rightly emphasised.¹⁸³⁷ Moreover, it is quite odd that, in the same article, Greer appeals to a moral assessment of what counts as the worst form of suffering,¹⁸³⁸ an inherently value-laden statement that is completely dependent on variable factors such as the chosen ethical framework and antecedent premises, while also claiming that there are objective reasons for a particular moral choice,¹⁸³⁹ only to criticise other authors for doing exactly what he himself does—rely on “unconvincing normative assumptions”¹⁸⁴⁰, or in other words, relying on their own interpretations of moral rights and wrongs.

Greer’s dedication to construct exceptions for extreme cases was not founded, as his claim that this would not open the door to routine abuse, because exceptions would apply only in case of virtual certainty, imminent risk of harm and would be limited to threatening but never employing ill-treatment, and only after all other options have been exhausted,¹⁸⁴¹ is simply far-fetched and unconvincing. If state agents are capable of reaching virtual certainty in their intel, it is rather probable that they would be capable of rescuing victims and solving a situation with other means instead of breaching an absolute right. And in practice, it is precisely because they cannot meet these standards that they resort to “easier” means and shortcuts, such as threatening with ill-treatment and it still remains to be revealed why should law suddenly allow them to do so.

Generally, Greer’s whole position rests on the idea that, from a moral perspective, there is a need for applying a proportionality test in order to solve what he perceives as a conflict of rights, including absolute rights, hence he advocated for introducing certain exceptions, thereby concluding that there cannot be any rights that are absolute.

Yet Greer was not alone in this persistence concerning the moral background. When suggesting that in case of conflict, negative obligations should generally trump positive obligations, since the former requires only restraint while the latter requires action,¹⁸⁴² Smet also appealed to a normative principle and not legal authority, apparent also from his following reference to Kant’s ideas.

On the other hand, Smet felt the need to resort to legal arguments, such is the case with his statement that the manner in which the ECtHR interpreted Article 3 rules out any justification for ill-treatment.¹⁸⁴³

However, his proposals are not without peculiarities. Although it is hardly unusual for courts, when deliberating and interpreting law, to take moral considerations into account, as moral arguments usually guide their decisions, it is striking that Smet himself labelled as a “legal principle” a solution based exclusively on two moral arguments. As a reminder, he

¹⁸³⁶ See Article 2 of the UDHR.

¹⁸³⁷ Smet, “Conflicts between Absolute Rights”, 490.

¹⁸³⁸ Greer, “Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?”, (2015): 110.

¹⁸³⁹ *Ibid*, 125.

¹⁸⁴⁰ *Ibid*, 123.

¹⁸⁴¹ *Ibid*, 88-89.

¹⁸⁴² Smet, “Conflicts between Absolute Rights”, 491.

¹⁸⁴³ *Ibid*, 475.

suggested that when hard cases cannot be resolved by conventional legal reasoning, the first step should be the previously mentioned position that negative obligations/rights take precedence over positive obligations/rights, while the second step is based on the difference between direct and indirect agency, as negative rights can only be balanced against positive rights when interference with the negative rights does not involve using a person as a means.¹⁸⁴⁴ Even if this suggestion is compelling and may help courts decide hard cases, it is exclusively moral in character and has little to no bearing on whether absolute rights exist or what they are, which generally calls into question its impact on the meritum of the discussion at hand.

Mavronicola was also aware of the danger of mixing moral with legal positions and tried to warn against it when she underlined that the essence of the legal absoluteness is the fact that it only pertains to state obligations and should not be confused with ethical discussions regarding individual responsibility or the legitimacy of particular acts in extreme circumstances.¹⁸⁴⁵ Concisely, absolute prohibition means that any instance of the prohibited action by the state is categorically unlawful under human rights law.¹⁸⁴⁶

Her arguments were predominantly legal, with only occasional remarks on morality. She maintained, for example, that negative and positive duties cannot be in direct competition, as the latter are important but not boundless and will ultimately give way to the former. This conclusion is grounded in the reasoning and case-law of the ECtHR, as the relevant legal authority.¹⁸⁴⁷ Then, she noted in passing that she believes that this stance is also morally justified, but that was merely an aside.¹⁸⁴⁸ And that is the appropriate approach in an analytically clear exchange of arguments.

So, legally speaking, she defined absoluteness as a “legal non-displaceability of a right”.¹⁸⁴⁹

In any case, she remained firmly opposed to the introduction of moral consequentialism into the domain of absolute human rights, insisting that Greer had not succeeded in undermining legal absolutism, conceding only the possibility that his positions might have shaken certain moral imperatives, and she correctly regarded his contribution as belonging solely to moral discussions of hard cases.¹⁸⁵⁰

Once Graffin joined the discussion, it began to resemble the Gewirth-Levinson debate, primarily because many of the arguments recur, such as the valid empirical claim that state agents typically have alternative options at their disposal instead of resorting to the infringement of an absolute right.¹⁸⁵¹ The only difference is that this discussion, on virtually the same topic and rather similar arguments, is taking place nearly three decades later.

¹⁸⁴⁴ *Ibid*, 498.

¹⁸⁴⁵ Mavronicola, “Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute”, 3.

¹⁸⁴⁶ *Ibid*, 10.

¹⁸⁴⁷ *Ibid*, 5.

¹⁸⁴⁸ *Ibid*.

¹⁸⁴⁹ *Ibid*, 12.

¹⁸⁵⁰ *Ibid*, 14-19.

¹⁸⁵¹ Graffin, “*Gäffen v Germany*, the Use of Threats and the Punishment of Those Who Ill-Treat During Police Questioning”, 699.

At last, one of the Greer's primary objections to absolute rights cannot go unaddressed. The claim that a norm guaranteeing a right, which contains no explicit limitations, indicates the right's absoluteness was consistently reproached by Greer.¹⁸⁵² However, it is not that simple. While the fact that the norm is formally unqualified may be a hint of absoluteness, it is not a guarantee of such a trait, due to the fact that human rights law norms gain their full content only through courts' interpretation, which may allow for implicit limitation. A good example is exactly the one Greer used, the right to a fair trial in Article 6 of the ECHR, which he claimed is absolute due to the strict, exceptionless normative formulation,¹⁸⁵³ but he did not consider the fact that the ECtHR allowed implicit limitations and explicitly stated that it is not absolute.¹⁸⁵⁴ Thus, the absence of explicit exceptions in an unqualified norm is an initial indication of an absolute right, but it is not sufficient to conclusively establish the right's absoluteness.

In any case, it remains paradoxical that, for a notion so frequently declared non-existent, absolute human rights have generated a substantive debate and controversy, which can, at the very minimum, be seen as a demonstration of its both legal and philosophical importance.

2. Are There Any Absolute Human Rights?

A sound response to Greer's main dilemma regarding the existence of absolute human rights could be that, as tentatively established in the preceding chapter, contemporary international human rights law recognises such rights, a category traceable to the field's earliest attempts at codification.¹⁸⁵⁵ At the same time, it must be reminded that not every non-derogable right has been declared absolute. Even though it was not the aim of this thesis to reveal possible normative significance of absolute rights, research results indicate that the proclamation of certain rights as non-derogable is motivated by different factors, including not only a previously described, factual lack of need to suspend certain rights, as is the case with prohibition of imprisonment for inability to fulfil a contractual obligation, but also a value-oriented background, which is evident with respect to absolute human rights.

This is not to say that other human rights lack moral value, but that absolute human rights contain stronger, suprapositive normative force. In essence, those are rights with the most striking natural law provenance, which places them beyond the positive legal system, either because they afford a more robust protection to human dignity, or because there is a larger consensus over their significance in the international community, or for whatever other reason. Scholars generally appear to agree with this position, so Waldron, for example, insisted that there are "certain things that are not to be done to human beings", and explained that international legal documents simply reflect our recognition of this fact in the form of a legally binding treaty.¹⁸⁵⁶

¹⁸⁵² Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?", (2018): 299.

¹⁸⁵³ *Ibid.*

¹⁸⁵⁴ ECtHR, *Golder v. UK*, para. 38; ECtHR, *Deweert v. Belgium*, para. 49.

¹⁸⁵⁵ This is a reference to the discussion within the Third Committee during the preparations of the UDHR, see Morsink, *Article by Article*, 178.

¹⁸⁵⁶ Waldron, *Torture, Terror, and Trade-Offs*, 198.

It is true that one could argue that this equally applies to all human rights. However, the greater significance or elevated status of absolute human rights stems from the fact that both legal theory and practice regard them as categories that are “not subject to limitations or restrictions”, unlike other human rights that are often denominated as relative and that are susceptible to restrictions.¹⁸⁵⁷ Giuseppe Cataldi recognised the distinction between absolute and relative rights, but added that absolutely guaranteed rights are “considered essential to human dignity, presumed expression of the principles of *jus cogens*”.¹⁸⁵⁸

Given that the examination of the underlying moral weight behind absolute human rights is not in the focus of this thesis, it may be questioned why this issue is being brought up at this point. Well, apart from the need to address Greer’s concerns, there are at least two main reasons, one being that arguments presented so far seem to be hardly disputable, and second, once again in the words of Waldron, because “a legal prohibition is only as strong as the moral and political consensus that supports it”.¹⁸⁵⁹

Thus, it is clear that these are by no means trivial matters, whether considered in a broader moral philosophy context or specifically within the realm of law. However, questions like how this normative, moral significance can be identified (or is being identified) or how it comes into being in the first place, are left for some future endeavour. In the meantime, what remains to be done in this legal analysis is to uncover what absolute human rights are, to catalogue which rights have so far been regarded as absolute, and to position them within the normative hierarchy of international law.

3. What Are Absolute Human Rights Said to Be?

Before embarking on that central task of this thesis, it may prove worthwhile to present some of the definitions of absolute human rights that have thus far been offered by legal scholars, even though they essentially revolve around the same ideas that have already been noted to a certain extent. Nevertheless, presenting these views will facilitate extraction of those core ideas.

So, while there are many broad determinations of absolute human rights, such as that they “cannot be interfered with whatever the justification”¹⁸⁶⁰ or that “nothing can override them”¹⁸⁶¹, some authors gave more detailed definitions.

Trapp, for instance, ascertained that “international human rights law recognises a core of rights that are absolute”,¹⁸⁶² and that “these rights protect human dignity and integrity and are not subject to any qualification, whether in the form of an exception or derogation (within international human rights law treaty regimes) or defence (under general

¹⁸⁵⁷ Marauhn, Strobel, “Limitations and Restrictions of Rights”, 427.

¹⁸⁵⁸ Cataldi, “Introduction to the Universal Declaration of Human Rights”, 104. More on the relation between absolute rights and the *jus cogens* norms will be offered in the following chapter.

¹⁸⁵⁹ *Ibid*, 216.

¹⁸⁶⁰ Steve Foster, *Human Rights and Civil Liberties* (Harlow: Pearson Education, 2011), 31.

¹⁸⁶¹ Michael Freeman, “Universalism of Human Rights and Cultural Relativism,” in *Routledge Handbook of International Human Rights Law*, eds. Scott Sheeran and Sir Nigel Rodley (London: Routledge, 2013), 53.

¹⁸⁶² Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 305.

international law)",¹⁸⁶³ thereby admitting their broader practical implications in contrast to the usual narrative.

According to Olivier De Shutter, the specific regime of rights of an "absolute" character contains rights that "must be respected at all times and may not be restricted even for compelling reasons".¹⁸⁶⁴

Slightly different terminology was adopted by Steve Foster, who distinguished between absolute and conditional rights, which he based on two factors – whether the rights are non-derogable and whether they can be subject to interference under normal circumstances.¹⁸⁶⁵

On the other hand, there are also those denying the existence of such a category in law. For example, Scott Sheeran insisted that human rights are not absolute, as "most legal rights have a degree of potential balancing within their definition".¹⁸⁶⁶

In a rare deliberation specifically dedicated to the concept of absolute rights, Melenko and Pranyuk described absolute rights as those that can never be restricted, whereas relative rights can, as they are subject to limitations and proportionality analysis.¹⁸⁶⁷ They underlined the fact that the prohibition of torture is absolute, since it allows for no exceptions, as well as because torture can never be justified by any social interest.¹⁸⁶⁸

Nevertheless, they questioned the appropriateness and axiological-ontological rationale for classifying human rights as absolute or relative.¹⁸⁶⁹ Perplexed by the fact that there are cases in which the ECtHR did not find a deprivation of life to be contrary to the ECHR, while at the same time trying to protect the prohibition of torture at all costs, they determined that the Court prioritised other (absolute) rights at the expense of the right to life, the right without which other rights make no sense.¹⁸⁷⁰

Perceiving this as unjust, these authors suggested that the Court should consider deprivations of life, especially in the cases referred to in this thesis to illustrate pinpoint exceptions, to be acts of torture, and thereby afford the absolute level of protection to the life of individuals.¹⁸⁷¹ The underlying idea behind these suggestions is that it is not possible to bring about someone's death without inflicting severe physical and psychological suffering, which itself can be viewed as a form of torture.¹⁸⁷²

¹⁸⁶³ *Ibid.* She went even further to explain that circumstances precluding wrongness laid down in Article 26 of the ARSIWA cannot be applied to the breach of prohibitions of slavery and torture, due to their jus cogens nature, *ibid.*

¹⁸⁶⁴ Olivier De Shutter, *International Human Rights Law*, 295.

¹⁸⁶⁵ Foster, *Human Rights and Civil Liberties*, 78-79.

¹⁸⁶⁶ Scott Sheeran, "Human Rights and Derogation in Peacekeeping," in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge: Cambridge University Press, 2016), 231.

¹⁸⁶⁷ Melenko, Paranyuk, "The Issue of Correlation Between Absolute and Relative Human Rights", 39.

¹⁸⁶⁸ *Ibid.*, 41.

¹⁸⁶⁹ *Ibid.*, 42.

¹⁸⁷⁰ *Ibid.* See also Serhiy Melenko and Dan Paranyuk, "To the Issue of Determining the Criteria for Differentiating Human Rights into Absolute and Relative", *European Journal of Law and Public Administration* 6, no. 2 (2019): 102.

¹⁸⁷¹ Melenko, Paranyuk, "The Issue of Correlation Between Absolute and Relative Human Rights", 42.

¹⁸⁷² *Ibid.*

Moreover, they insisted that both acts of killing and acts of torture have the following elements in common:

1. an intentional nature of the action;
2. inflicting physical pain when applied;
3. purpose to punish an individual for the unlawful committed actions.¹⁸⁷³

Therefore, if deprivations of life were not considered to be torture, even though they may inflict the same amount of suffering and have the very same consequences, it would mean that the ECHR system is “indirectly but lawfully” allowing torture.¹⁸⁷⁴ Thus, they concluded that any relative right that is lawfully infringed can become a direct or indirect precondition for the violation of absolute rights, or more specifically, when a state official employs specialised measures permitted by domestic legislation and the ECHR, such actions may trigger violations of other absolute human rights.¹⁸⁷⁵

A few comments are warranted here. First of all, the fact that these authors insist on the unqualified nature of absolute rights clearly reflects a widely held doctrinal position. While there is some basis for their broad interpretation, particularly the argument that the deprivation of life could be qualified as torture because they both share decisive elements, it remains untenable, at this stage in the development of international law, to claim that every intentional killing by a state constitutes torture. This is primarily because the claim depends largely on the definition of torture that is accepted, and most widely recognised definitions, in addition to requiring suffering, include another important qualifier, namely, a specific purpose such as obtaining information, punishment or intimidation.¹⁸⁷⁶ It follows that not all deprivations of life, even when intentional and painful, meet these criteria.

Moreover, by suggesting that all killings should be equated with torture, the authors seem to propose blurring necessary legal distinctions that may undermine the whole architecture of the ECHR. The fact that the ECtHR has so far been reluctant to accept the proposed line of reasoning can be seen as a consequence of an effort to ensure the absolute protection of certain rights, while at the same time navigating the complex reality in which rights may come into a conflict, especially in cases where states are faced with grave moral dilemmas, such as the “ticking-bomb” scenarios.

No matter how compelling and intuitive it may seem to assign to the right to life the highest level of protection as the ultimate value, the previous analysis has demonstrated that in the current framework of human rights this is not the case. Despite recognising the complex interplay between different human rights and reinforcing the high moral and legal status accorded to the absolute rights, the authors’ approach may be criticised for conflating distinct legal categories that have been established so far and serve important practical and normative purposes, thereby disregarding the necessity for at least principled differentiation, and overlooking the fact that international human rights monitoring bodies are already, at times, struggling to uphold robust protection of absolute rights.

Now, another scholar has offered an interesting account of absolute rights. Grégoire Webber aptly remarked that international legal documents that guarantee human rights include two types of formulations, one being that “Everyone has the right to ...” and the

¹⁸⁷³ Melenko, Paranyuk, “To the Issue of Determining the Criteria”, 106.

¹⁸⁷⁴ *Ibid.*

¹⁸⁷⁵ Melenko, Paranyuk, “The Issue of Correlation Between Absolute and Relative Human Rights”, 42.

¹⁸⁷⁶ See Article 1 of the CAT.

other in the form of a prohibition stating that “No one shall be ...”.¹⁸⁷⁷ In the case of the ECHR, the negative injunction can be found in regard to the intentionally depriving another of life, torture, inhuman or degrading treatment or punishment, slavery or servitude, and *ex post facto* laws, or in other words, all those rights that are in the jurisprudence of both the ECtHR and national courts of Member States denominated as “absolute prohibitions” and “absolute rights”.¹⁸⁷⁸ Peculiarly, he also noticed that none of these provisions actually contain the word “right”.¹⁸⁷⁹

According to Webber, the ECtHR based its qualification of Article 3 of the ECHR as an “absolute right” due to the absence of “exceptions”, with exceptions in this context referring to derogations and limitations.¹⁸⁸⁰ While acknowledging that these “formal-structural considerations” are relevant, he emphasised that it is the very formulation of rights that provides stronger grounds for considering them absolute. More precisely, the specific formulations of absolute rights provide clear guidance on what actions are required or prohibited, a feature absent from the formulations of other human rights.¹⁸⁸¹ Yet, this is not to suggest that terms like “torture” or “servitude” are not open-ended, as they are, leaving vast room for interpretation, hence their content clarifies and shapes the meaning of the right.¹⁸⁸² Put differently, clarifying what these terms mean and what specific conduct they cover defines the content of the right itself, because everyone subject to the prohibition has a duty to refrain from the defined conduct.¹⁸⁸³ In contrast, when it comes to other rights like freedom of expression or freedom of religion, simply defining what terms like “expression” or “religion” mean is not going to be sufficient to reveal what exactly is expected of others in the name of these rights.¹⁸⁸⁴

Therefore, he concluded that “as formulated, rights to things cannot be absolute”, as “they are not suitable candidates for making a non-defeasible claim against another: they fail to identify who is to do or refrain from doing what to whom”.¹⁸⁸⁵ So, for Webber, one part of absoluteness is the fact that these rights “identify duties held by persons not to perform certain acts”.¹⁸⁸⁶

In other words, the unique trait of absolute rights is that their protection matches exactly the scope they cover, since any infringement of these rights can never be justified and they are fully protected whenever they are applied.¹⁸⁸⁷

Next, as this thesis has already shown, another possible aspect of absoluteness bears on proportionality analysis. This reliance on whether balancing is permitted as the decisive criterion for distinguishing absolute from other categories is widespread throughout the

¹⁸⁷⁷ Webber, “Proportionality and Absolute Rights”, 75.

¹⁸⁷⁸ *Ibid*, 76.

¹⁸⁷⁹ *Ibid*.

¹⁸⁸⁰ *Ibid*, 77.

¹⁸⁸¹ *Ibid*, 78.

¹⁸⁸² *Ibid*.

¹⁸⁸³ *Ibid*.

¹⁸⁸⁴ *Ibid*. This is particularly true since the development of positive obligations in human rights law, which have extended (states’) obligations and broadened the scope of most human rights.

¹⁸⁸⁵ *Ibid*.

¹⁸⁸⁶ *Ibid*, 79.

¹⁸⁸⁷ *Ibid*, 84. The same stance could be found in Barak, *Proportionality*, 27.

literature deliberating this subject. Take, for example, Sommario's assessment that "there are but a few absolute human rights", as the exercise of many rights entails balancing individual against general interests,¹⁸⁸⁸ or Kai Möller's position that while most rights can be limited in line with the proportionality test, some rights are absolute.¹⁸⁸⁹ Similarly, Barak also took the view that if the right is absolute, there is no room for proportionality.¹⁸⁹⁰ As described by Webber, the shared feature in these positions is that absolute rights are exempt from proportionality analysis.¹⁸⁹¹

By contrast, Webber also identified an alternative view in the literature – the claim that absolute rights are the outcome of proportionality analysis.¹⁸⁹² The assertion that rights can be viewed only through the lens of proportionality is reflected in the views of Matthias Kumm, who questioned what could justify protecting an interest beyond the requirements of proportionality.¹⁸⁹³ So, this claim lies on the assumption that the right is absolute because the balance of interests will (almost) always favour that right.¹⁸⁹⁴ Since this is only confined merely to a high degree of certainty that the right will take precedence over other interests,¹⁸⁹⁵ it may be more appropriate to mark them as "apparently absolute".¹⁸⁹⁶ In other words, this would mean that there is "no such thing as an absolute principle, only the appearance of one based on the likely outcome of the balance of interests in a vast majority of cases".¹⁸⁹⁷ According to this claim, then, absoluteness is not to be understood as being in principle *non-defeasible*.¹⁸⁹⁸

In any case, both of these claims led Webber to conclude that they have a common thread, which is treating proportionality as fundamentally at odds with the concept of absolute rights.¹⁸⁹⁹ It must be underlined that such doctrinal views are in line with the manner of reasoning of international bodies regarding rights that they have qualified as absolute, so it seems inevitable to conclude that there is a consensus that absoluteness excludes any balancing and proportionality analysis. Thus, this is a confirmation that absolute rights function according to an either-or, black-or-white scheme, characteristic of rules rather than principles, and that consequently, in case of conflict (even if it were artificially constructed), they always take precedence over other rights. This may well be the

¹⁸⁸⁸ Sommario, "Derogation from Human Rights Treaties", 326.

¹⁸⁸⁹ Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012), 180.

¹⁸⁹⁰ Barak, *Proportionality*, 471.

¹⁸⁹¹ Webber, "Proportionality and Absolute Rights", 80.

¹⁸⁹² *Ibid.*

¹⁸⁹³ *Ibid.* See also Matthias Kumm, "Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review", *European Journal of Legal Studies* 1, no. 1 (2007): 11.

¹⁸⁹⁴ *Ibid.*

¹⁸⁹⁵ Matthias Klatt, Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012), 31.

¹⁸⁹⁶ Webber, "Proportionality and Absolute Rights", 81.

¹⁸⁹⁷ Klatt, Meister, *The Constitutional Structure of Proportionality*, 32.

¹⁸⁹⁸ Webber, "Proportionality and Absolute Rights", 82.

¹⁸⁹⁹ *Ibid.*

reason why some authors described absolute rights as prioritised rights,¹⁹⁰⁰ or immune rights.¹⁹⁰¹

Interestingly, Webber inferred from his reporting on Möller's analysis of proportionality that at least one right must be absolute, the right to proportionality itself, since it is not subject to proportionality, *i.e.*, it is not subject to justified infringement, and it is exceptionless,¹⁹⁰² thereby illustrating all the key characteristics of absoluteness in one example.

Ultimately, he claimed that if a right outlines exactly what one person owes to another, or in other words, what actions or omissions are required, then that right has a potential to be absolute, and he identified two ways to approach this idea.¹⁹⁰³ The first one focuses on a small group of rights that are widely accepted as absolute, which are all linked to prohibitions, *i.e.*, duties not to do something.¹⁹⁰⁴ These duties are seen as absolute precisely because they are exceptionless, as there are no circumstances in which it is justified to break them.¹⁹⁰⁵ They apply in every case and situation, which is why the rights tied to these duties are considered absolute, and most importantly, these duties cannot conflict with each other.¹⁹⁰⁶ The second approach builds on the first by looking at how legal rights can sometimes achieve what moral rights cannot.¹⁹⁰⁷ While in morality they might be subject to exceptions or conditions, the law can clarify when and how a duty applies, making it unconditional and exceptionless for legal purposes.¹⁹⁰⁸ In this way, carefully crafted positive duties can also be absolute, as long as they are specified in a non-defeasible manner. To cite his reference to Aquinas, "it can be said that some rights are absolute because they are correlative to duties that bind always and for every situation (*semper et ad semper*) and other rights can be made absolute if the correlative duties are specified so as to hold only in those situations and relative to the time and place in which they properly hold (*semper, sed non ad semper, sed pro loco et tempore*)".¹⁹⁰⁹ The latter form of absoluteness resembles what, at the beginning of this thesis, Gewirth coined "Individual Absolutism", or post-consequentialist residue, meaning that if specified sufficiently, almost any right could be transformed into an absolute one,¹⁹¹⁰ yet such rights have no capacity to guide general behaviour.¹⁹¹¹

To put it succinctly, it can be stated that at this point of development of international human rights law, there is a common understanding that absolute human rights are rights that allow for no ifs, no ands, and no buts.

¹⁹⁰⁰ Stenlund, Slotte, "Forum Internum Revisited", 440.

¹⁹⁰¹ Hartman, "Derogation from Human Rights Treaties in Public Emergencies", 9.

¹⁹⁰² Webber, "Proportionality and Absolute Rights", 87.

¹⁹⁰³ *Ibid*, 97.

¹⁹⁰⁴ *Ibid*.

¹⁹⁰⁵ *Ibid*.

¹⁹⁰⁶ *Ibid*.

¹⁹⁰⁷ *Ibid*, 97-98.

¹⁹⁰⁸ *Ibid*, 98.

¹⁹⁰⁹ *Ibid*, citing John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998), 164.

¹⁹¹⁰ Similar in already cited Russ Shafer-Landau, "Specifying Absolute Rights", 209.

¹⁹¹¹ Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 18-19.

4. What Are Absolute Human Rights?

The preceding preparatory analysis was indispensable to extract and filter baseline assumptions, map points of convergence and divergence among scholars and assess doctrinal groundwork, with an eye on isolating persuasive findings and evaluate supporting reasons, which all provide the platform for the account that follows.

Building on the conclusions reached thus far and analysed positions of various authors, it is now the time this thesis advances a set of elements for a definition of absolute rights, thereby proposing a framework within which the absoluteness of a right can be assessed with greater clarity and precision, in order to move from descriptive to a more determinate, operational account.

Therefore, indispensable elements of the definition of absolute human rights are the following.

(1) *Absolute Rights Protect Against Certain Acts by Categorical Prohibitions.*

To start with, prior research indicated that several authors identified that absolute rights take the form of negative rights, prohibitions or negative injunctions.¹⁹¹²

In other words, on this view the correlative duties are duties of restraint rather than performance. These “do-not” commands which are, like other human-rights obligations, primarily directed at states to protect individuals, forbid undertaking certain acts and are typically framed in deontological terms, operating in a binary fashion—either complied with or violated. Such duties leave no room for ambiguity and any kind of intermediate ground that can often be present in positive obligations stemming from human rights. They apply in each and every case and situation.

Negative obligations are clear, straightforward, and even rigid, capable of setting bright-line bans with no space for trade-offs, which is why they are uniquely suited for absolute human rights. By comparison, positive obligations require weighing of interests, choosing among various options, or even involve allocating resources, and these are traits that introduce relativity and complexity that are incompatible with absolutism.¹⁹¹³ For instance, ensuring the right to freedom of peaceful assembly typically involves balancing priorities and being flexible in order to achieve a compromise, whereas that is not the case with the strict prohibition of torture or slavery.

Some of these findings are echoed in Smet’s conclusion that when absolute rights conflict with each other, negative obligations should prevail over positive obligations, since compliance with the former consists in not acting, whereas the latter impose some sort of active conduct.¹⁹¹⁴ The underlying idea behind Smet’s reasoning was probably that negative obligations, by requiring no resources beyond the will to abstain, align more closely with

¹⁹¹² Webber, “Proportionality and Absolute Rights”, 79; Bulthuis, *The Illusion of Absoluteness?*, para. 6.1. 2. Koji identified that non-derogable rights are predominantly negative rights, which ensure freedom from state interference, Koji, “Emerging Hierarchy”, 927. Joel Feinberg also identified that negative rights are the most plausible candidates for absoluteness, see Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973), 95.

¹⁹¹³ Similar views are also present in Dembour, *Who Believes in Human Rights?*, 82-83.

¹⁹¹⁴ Smet, “Conflicts between Absolute Rights”, 491.

the uncompromising nature of absolute rights, whereas positive obligations, necessitating action, are not completely compatible with absolute rationale due to their inherent relativity.

Moreover, it must be emphasised that, in practice, negative duties neither do nor can come into a conflict with any other consideration. Since they are narrowly defined inactions, they establish non-overlapping duties that do not compete with one another, as seen in the distinct prohibitions against torture and slavery. Where compliance consists in simple omission, two duties cannot logically require mutually exclusive actions. Alleged counterexamples in the form of academic thought experiments, some of which have already been presented in the previous chapters, are largely hypothetical and detached from real-world conditions, where states can clearly delineate their obligations of self-restraint, which only require pure avoidance of specific, prohibited acts.

Inevitably, now is the time to explicitly address what has been evident from the previous lines: within this framework of absolute human rights, positive obligations cannot be considered absolute.

As described in the previous chapters, international courts have traditionally read (negatively formulated) human rights as including not only negative, but also positive obligations for states, particularly to prevent, investigate, and prosecute those responsible. Typical for those positive obligations is the language of vague and broad legal standards, such as “adequate measures”¹⁹¹⁵ or “reasonable steps”¹⁹¹⁶, that necessarily calls for some sort of weighing and assessing.

Although it is highly unlikely that, for instance, the ECtHR would openly acknowledge applying proportionality test to positive obligations under Article 3 of the ECHR, and what is more, it was even shown that its approach towards these obligations often resembles categorical positions, there are still examples of decisions that indirectly support the view that proportionality is at work. A clear illustration of this relativity appears in the (repeated) stance of the ECtHR that “bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”.¹⁹¹⁷ The Court went on to explain how the reasonableness of investigative measures “will vary considerably with the facts of the situation”,¹⁹¹⁸ thereby highlighting their context-dependent nature. Their flexibility is evident, for instance, in the Court’s view that the choice of means amounting to positive measures “is in principle a matter that falls within the Contracting State’s margin of appreciation”.¹⁹¹⁹ Given that margin of appreciation often facilitates balancing by allowing states leeway in implementation, and that the Court needs to review whether the measures were appropriate, adequate or, it could also be said proportionate to the aim, such as protecting human dignity, it follows that there is no room for absolute framework here.

Positive obligations are immensely important in general, and arguably even more significant in regard to the absolute prohibitions. Mavronicola was right to underline that

¹⁹¹⁵ This wording can be found in the Court’s case law, see ECtHR, *Opuz v. Turkey*, App. No. 33401/02, Judgment of 9 June 2009, para. 165.

¹⁹¹⁶ See ECtHR, *Z and Others v. UK*, App. No. 29392/95, Judgment of 10 May 2001, para. 73.

¹⁹¹⁷ ECtHR, *Brecknell v. UK*, App. No. 32457/04, 27 November 2007, para. 70.

¹⁹¹⁸ *Ibid*, para. 71.

¹⁹¹⁹ ECtHR, *Mikhno v. Ukraine*, App. No. 32514/12, Judgment of 1 September 2016, para. 127.

they should be approached rigorously,¹⁹²⁰ as this a necessary part of them being able to deliver genuine protection and support for the absolute prohibition. Yet, they themselves are not absolute. Therefore, this thesis departs from Mavronicola's view that positive obligations may form part of an absolute rights, provided their specification is legitimate and aligns with the right's purpose.

Additionally, another point should be reiterated regarding positive obligations, which is also derived from this negative-positive dichotomy. Namely, from the claim that absolute rights are necessarily prohibitions, it follows that they always entail obligations of result. Put differently, negative obligations establish a legal duty to attain a particular outcome. On the other hand, positive obligations are obligations of conduct, as they direct states to implement specific measures or actions, while not guaranteeing a particular result. After all, even the ECtHR admitted that the (positive) obligation to carry out an effective investigation is an obligation of means (conduct) only, since the absence of concrete findings, or only limited ones, does not imply failure.¹⁹²¹

Putting it into a systematic legal categorisation, it could be said that negative obligations of absolute character constitute primary obligations, whereas positive obligations connected to that absolute right are secondary in their nature, activated only in order to contribute to their broader protection and implementation.

To conclude, only negative duties, which tolerate no exceptions, irrespective of the circumstances and possible justifications can be regarded absolute, as their uncompromising stance aligns with the need for unequivocal protections. The suggested framework of absolute rights ensures that fundamental protections remain inviolable while still allowing for some nuance in application of positive obligations.

(2) *Absolute Rights Cannot Be Subject to Human Rights Restrictions.*

It is by far rather obvious that absolute rights are contained in norms that are formulated in an unqualified manner. As already indicated, an unqualified norm is a necessary trait, but also a *prima facie* indication of absoluteness. In other words, when one spots a norm in a legal document concerning human rights that is in the form of a prohibition and appears to contain no qualifications or exceptions, there is a possibility that the norm at hand encompasses an absolute right.

However, for comprehensive understanding of absoluteness in human rights law, it was necessary to devote a substantial space in this thesis to the topic of restrictions of human rights, with the aim of unpacking, clarifying, and systematising that terrain. After all, there is little analytical achievement in simply asserting that absolute rights admit of no exceptions or restrictions, since anyone with minimally trained legal reasoning can anticipate as much. The true difficulty, and the possible source of persistent confusion, lies in specifying what counts as restrictions.

Against that background, (main) contribution of this thesis is providing determinate meaning to the many, often similar, notions and concepts that circulate in the literature, mostly revolving around human rights restrictions and limitations.

Therefore, for the reasons of clarity, this element needs to be reformulated in the terms used in this thesis, or in other words, it means that:

¹⁹²⁰ Mavronicola, *Torture, Inhumanity and Degradation under Article 3*, 55.

¹⁹²¹ ECtHR, *Brecknell v. UK*, para. 66.

- *Absolute Rights are Non-Derogable.*

In accordance with the systematisation offered by this thesis, the first type of human rights restrictions is derogation. Yet, some human rights are proclaimed non-derogable in human rights treaties, meaning they cannot be suspended even during states of emergency, as evidenced by the varying lists enumerated in derogation clauses in different treaties.

It is true that some sparks of doubt remain around the question what exact rationale and criteria for designating rights as non-derogable are, whether this status is based on “value-oriented” approach or (also) on the fact that some rights will never become necessary to derogate from during a state of emergency. Unfortunately, case-law of monitoring bodies did not offer much support in this regard, since even there are one can find occasional hesitations, contradictions, and uncertainty about the precise justification behind the status of non-derogability, as illustrated in the chapter on human rights restrictions.

Still, the fact that non-derogable rights hold firm during emergencies is a clear indication of their crucial role in international law, as they must remain protected even when the state survival is threatened. Non-derogability denotes a baseline of inviolability that endures even in the most exceptional circumstances. And this is far from not being significant. If the undertaken analysis of the institute of derogation and non-derogable rights has shown anything, it is that the majority of scholars, as well as substantial part of the views expressed during the drafting of treaties, take the position that derogation clauses limit state power with regard to the fundamental rights in order to safeguard them and strengthen judicial role in securing their protection.¹⁹²²

Moreover, the adjudicating bodies put great weight on the fact that the right is non-derogable, even out of the state of emergency context, as was clearly evident from the preceding analysis. For instance, there are numerous analysed judgments in which the ECtHR emphasised and underscored that the right is absolute because no provision is made for exceptions and “there can be no derogation from it”.¹⁹²³

In his own analysis, Waldron also found significance in non-derogability, stating that human rights law makes certain rights absolute “in a very literal sense”, as the derogation clause is explicitly proclaimed non-applicable to them under any circumstances.¹⁹²⁴

After all, their special status is the very reason why the previous chapter scrutinised only non-derogable rights listed in the ECHR, ICCPR and ACHR.

Ultimately, differences in the lists of non-derogable rights across human-rights treaties have no bearing on whether a given right is absolute, as they simply reflect treaty-specific choices about which rights to admit the highest level of protection, influenced also by specific historical settings, and the only possible implication of this fact might be that various rights are recognised as absolute under different treaties.

So, while being non-derogable is a key part of what makes a right absolute, it is only one piece of the puzzle, hence non-derogability remains an indispensable but insufficient condition for absoluteness in human rights law.

¹⁹²² See, for instance, Hartman, “Derogation from Human Rights Treaties”, 11. Lehto also traced absoluteness back to its non-derogability, Enni Lehto, “Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe”, 57.

¹⁹²³ ECtHR, *Tyler v. UK*, para. 30.

¹⁹²⁴ Waldron, *Torture, Terror, and Trade-Offs*, 3.

- *Absolute Rights Contain No Limitation Clause.*

Another type of human rights restrictions is channelled through “limitation clauses” embedded in provisions guaranteeing specific right, which authorise states to impose restrictions on the enjoyment of a right at hand, provided it serves a legitimate purpose, such as safeguarding rights of others, national security, public order, public health, or morals, and is deemed “necessary in a democratic society”. This option is a response to the fact that rights are exercised within a community, hence they might sometimes come into conflict with other rights, societal interests, or other priorities. Therefore, limitations presuppose context-sensitive balancing, which is at odds with the overall logic of absoluteness.

It is also noteworthy that the vast majority of provisions containing limitation clauses pertain to “freedoms” rather than prohibitions. These are broadly framed rights, aimed at protecting open-ended spheres of action (and inaction), which naturally increases the likelihood of their overlapping or conflicting with other considerations.¹⁹²⁵ Therefore, it is expected that the law must sometimes trim the edges of these broad spheres and consequently, limit one’s rights. In any case, even the treaty architecture signals that while many rights operate within a structured field of justifiable restrictions, absolute rights do not admit such qualifications.

To conclude, absolute rights must be drafted without any limitation clause. They are framed as categorical duties of non-interference and their scope is not mediated by lists of legitimate aims that may override them or a necessity test, as there must be no textual gateway that would permit any kind of balancing against competing interests.

- *Absolute Rights Contain No Implicit Limitations.*

Although it is true that in the majority of cases, options for routine trade-offs are routed through right-specific explicit limitation clauses, the foregoing analysis has demonstrated that in the case-law of international adjudicating bodies, primarily the ECtHR, there are cases of implicit limitations that were applied to derogable rights often framed in broad, general terms.

They are implicit because there is no explicit legal provision serving as their ground, so their invocation depends solely on the court’s decision. Consequently, this absence of a clear legal provision authorising their use adds a layer of interpretative complexity and grants judges greater discretion. Therefore, since it is up to judicial bodies to determine whether such limitations are permissible for specific rights, the whole institute can be criticised for its uncertainty.

Moreover, implicit limitations basically operate by the same scheme and should be approached in the same manner as explicit limitations. In other words, if they are found to

¹⁹²⁵ The observation that limitation clauses predominantly apply to “freedoms” should be noted as a factual trend, but treated with caution. It cannot be said that it is a signal of a deliberate, coherent pattern, because the reasoning of these legal documents is often challenging to identify with clarity. Indeed, if a consistent terminological framework were in place, terms such as “freedoms”, “rights”, and “prohibitions” would likely be employed with greater uniformity and supported by a clear, underlying rationale, something that is absent in the current texts of analysed treaties. As an illustration, in the ECHR, there is a right to respect for private and family life, and there is a freedom of thought, conscience and religion or freedom of expression, all of which contain limitation clauses.

be permissible, they must meet the same criteria as explicit limitations, such as pursuing a legitimate aim and satisfying the principle of proportionality.

However, due to the lack of explicit legal provision serving as their basis, there is no predefined list of the precise legitimate aims capable of justifying implicit limitations. Expectedly, this further complicates assessing whether they are applied appropriately and potentially even bears a risk of undermining legal certainty.

Be that as it may, implicit limitations cannot be attached to absolute rights, given their exceptionless nature, for the same reasons that exclude explicit limitations. This feature is significant and should be underlined, *inter alia*, for a practical reason – in assessing whether a right is absolute, it is not enough to note the absence of an explicit limitation clause in the provision itself; one must also examine the jurisprudence regarding the right to check whether courts have applied implicit limitations to it.

- *Absolute Rights Include No Pinpoint Exceptions.*

Last type of human rights restrictions identified by this thesis was coined as “pinpoint exceptions”, since they are narrow, text-embedded carve-outs that define in advance the precise situations in which a right does not apply. In other words, those are exhaustive, enumerated delimitations of scope contained in the provision guaranteeing a right at hand.

Examples that were already analysed include the right to life, as there are specified circumstances in which a deprivation of life would not be contrary to the particular international treaty. These provisions also lay down some conditions that need to be fulfilled, which revolve around proportionality, yet they are stricter compared to those required by the limitation clauses. So, pinpoint exceptions do not invite *ad hoc* balancing for broad aims as limitation clauses do but pre-delimit the right’s scope.

Expectedly, absolute rights cannot contain pinpoint exceptions, as there must be no annex of permissible situations in which the prohibition is to be lifted. As illustrated at the example of the right to life, pinpoint exceptions mean that although everyone has the right to life, but there are certain, narrowly defined and quite exceptional situations when taking that life will not be considered a violation of the right. That is simply unacceptable for absolute rights, as introducing a way-out would transform an absolute into a conditionally applicable right susceptible to weighing and fine-tuning that pinpoint exceptions are designed to channel in non-absolute contexts.

This may even lead to a conclusion that rights containing pinpoint exceptions sit somewhere between absolute and relative rights. They may be more significant than rights containing limitation clauses, as they are exempt from routine, everyday balancing against other interests, but they must still give way in narrowly enumerated, restrictively interpreted, exceptional situations where other considerations would prevail, so they cannot be classified as absolute.

Accordingly, pinpoint exceptions relate to specific rights whose scope the treaties delimit textually, in advance, but they have no place in provisions containing absolute, categorical prohibitions.

(3) *Absolute Rights Are Exempt from the Proportionality Analysis.*

Previous two elements naturally lead to the third one, which is that proportionality is essentially incompatible with absolute rights. Because these rights stem from categorical

prohibitions, they are closer to rules than to principles, and no interference with them would ever be justified.

If this element of the definition is already implicit in the previous two, it could be wondered why it is worth highlighting it separately. Well, it is, if nothing else, then to clarify once again how absoluteness is (to be) approached in practice.

The process behind the international adjudicating bodies' deliberation with regard to rights they treat as absolute has already been outlined in various parts of this thesis, but it should be reiterated here with the aim of its systematic presentation and drawing several concluding observations.¹⁹²⁶

As a reminder, there are several steps in adjudicating relative human rights. The ECtHR first defines the scope of the particular right, for instance, the contours of "private life", in order to determine whether the facts of the case amount to an interference, because it is possible that the raised issue falls outside the right's scope completely.¹⁹²⁷ If there is, in fact, an interference, the Court does not, of course, immediately conclude that the right has been violated.

Instead, recognising that the right is relative and may be subject to restrictions, such as limitations, it proceeds to determine whether the interference was justified. Put differently, it inquires whether it satisfies the conditions required by the particular type of restriction, such as, in the case of limitations, whether it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

And this is where the process of balancing comes into play, in form of weighing various considerations, that boils down to weighing the legitimacy of the restriction against the protection of the right.

Only after completing all these steps can the court conclude whether the interference was justified, or in other words, whether there has been a violation of the right.¹⁹²⁸

When it comes to absolute rights, the process is almost completely different.¹⁹²⁹ As clearly shown in the previous chapter, the ECtHR typically begins its assessment by explicitly declaring that a right is absolute only in cases involving Article 3. For other (potentially absolute) rights, such a declaration is generally not the starting point.

After determining that the alleged commission or omission occurred, the Court will usually proceed to assess whether it falls under the (absolute) prohibition at hand.¹⁹³⁰ In line

¹⁹²⁶ This analysis relies primarily on the reasoning of the ECtHR. Given the Court's leading role and the extent to which other monitoring bodies tend to mirror its jurisprudence, it provides a suitable paradigm for the discussion. The ECtHR also offers the richest practice concerning the adjudication of absolute rights, and is, indeed, responsible for introducing the term into international legal practice, hence it seems particularly suitable to rely on its case-law.

¹⁹²⁷ Similar analysis in Foster, *Human Rights and Civil Liberties*, 79.

¹⁹²⁸ For an example of the case where the Court deliberated on the limitations to the right to a private life see for instance ECtHR, *S. and Marper v. UK*, App. Nos. 30562/04, 30566/04, Judgment of 4 December 2008, paras. 66-126. See also Foster, *Human Rights and Civil Liberties*, 79.

¹⁹²⁹ Foster was also among authors who recognised this difference, see Foster, *Human Rights and Civil Liberties*, 79.

¹⁹³⁰ Dembour identified these two steps as well, see Dembour, *Who Believes in Human Rights?*, 75. Similar description of the Court's reasoning can be found in ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment*, part IV (B), para. 1.

with Dembour's previously described reasoning in two steps,¹⁹³¹ in the case of absolute rights, the Court's task is simply to interpret the term defining the object of the prohibition and decide whether the facts of the case fall within the scope of that term. In other words, the Court needs to investigate whether it can be qualified as a prohibited behaviour, such as torture or slavery, in order to distinguish trivial or non-serious acts from treatment that actually engages the protected human right. It is a matter of a legal qualification, and in case of torture, this step is often referred to as the "threshold test".

If the act can be qualified as a prohibited treatment, the conclusion follows automatically – the right is violated. There is no additional reasoning about possible justifications, because the right's absolute nature excludes it and the fact that the act has been undertaken by itself determines the outcome. And this illustrates that, at the beginning of this thesis, Gewirth was correct when he ascertained that "a right is *absolute* when it cannot be overridden in any circumstances, meaning that it can never be justifiably infringed and it must always be fulfilled without any exceptions"¹⁹³², but now that definition gained practical meaning. In case of absolute rights, any infringement inevitably leads to violation.

Such an approach treats the act as intrinsically wrong and categorically impermissible, thereby resembling deontological mode of reasoning, which is why it is quite appropriate for absolute human rights.

Nevertheless, a caveat is needed here, as certain aspects of this process have been criticised in the doctrine, and not without a reason. Namely, while examining whether it can qualify an act as, let's say some form of ill-treatment like torture, or put differently, whether it has reached a certain level of severity in order to deserve such a qualification, the Court takes different aspects of the situation into account.

In the Court's own words "the assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".¹⁹³³ Or take its similar wording stating that the assessment of humiliation in order for a treatment to be degrading 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 the punishment itself and the manner and method of its execution"¹⁹³⁴.

Deliberating such things is undoubtedly neither straightforward nor consistent process and is, to some extent, even elusive. This has led some scholars, Mavronicola among them, to express concern that it can drift into what she called "displacement" of the right. And the core of this fear lies exactly in the fact that this kind of approach evokes balancing and consequentialist reasoning, which could ultimately undermine the absolute nature of the right.¹⁹³⁵

Although this unease is not unfounded, it could be argued that the reasoning the Court applies in this regard cannot be considered proportionality analysis *per se*, or at least it is not the same type of balancing it performs when it comes to relative rights and their restrictions. Clearly, all these concepts that form prohibited acts, such as torture or slavery, have a certain

¹⁹³¹ Dembour, *Who Believes in Human Rights?*, 75.

¹⁹³² Gewirth, "Are There Any Absolute Rights?", 2.

¹⁹³³ ECtHR, *Valašinas v. Lithuania*, App. No. 44558/98, Judgment of 24 July 2001, para. 101.

¹⁹³⁴ ECtHR, *Tyrer v. UK*, para. 30.

¹⁹³⁵ Mavronicola, *Torture, Inhumanity and Degradation under Article 3*, 23-25.

(legal) meaning and predefined content. However, they also have a potential to encompass innovative forms of conduct or conducts that, when undertaken in particular contexts, fall within their scope, which is why the Court's role is so important. Through interpretation, the Court will take all relevant factors into account, including those "aggravating circumstances", to determine whether an act should be declared prohibited and that decision, naturally, depends on all relevant circumstances of the given case, especially since every case is different.

On the other hand, it is already well established that certain forms of conduct, such as Palestinian hanging or waterboarding, constitute ill-treatment and in situations where such acts come before the Court, the reasoning can be expected to follow the "either-or" scheme. If the act occurred, the right has been violated, without further inquire into other considerations such as the state's motives or various other factors. And that is the very essence of the absoluteness.

So, while here the proportionality analysis has no role, there is a sort of norm-application reasoning that can be coined "contextual interpretative qualification", which can be defined as a process of applying the absolute rights to the specific circumstances, using contextual factors not to justify or excuse the act, but to decide whether it falls within the right's scope.

Finally, it must be admitted that this process is susceptible to misuse in cases where the Court were to act in bad faith, though it remains to be seen how the Court would justify such a decision with credible and valid reasons. In any case, Mavronicola was right to insist that the Court's deliberation on absolute rights should by no means be "displacement through the back door" but should instead be guided by clearer definitions and stricter criteria.¹⁹³⁶

(4) *Absolute Rights Are Indefeasible*.¹⁹³⁷

The final element concerns a broader phenomenon of defeasibility, which has so many definitions in the philosophy of law that scholars even portrayed it as "a chaotic theoretical picture" that "seems to generate more confusion than clarity".¹⁹³⁸ Therefore, this thesis does not aspire to resolve any issues arising by this phenomenon, but to address it briefly as a gesture of respect to potential dissenting voices that may emerge in opposition to the absolute rights framework proposed here.

¹⁹³⁶ Mavronicola, "Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law?", 15.

¹⁹³⁷ Arguments concerning this element of absolute rights were developed for a co-authored presentation with Bojan Spaić at the Special Workshop "Legal Philosophy and Legal Practice" within IVR World Congress, organised in 2024 at Soongsil University. The author expresses profound gratitude to Spaić for his boundless energy, encouragement, and time devoted to our shared reflections on this angle of absolute human rights. Articulating arguments regarding this part of the framework would not be possible without his contribution. Moreover, the author is also thankful to David Duarte and Pedro Moniz Lopes, who rarely missed an opportunity to challenge this account of absolute rights – often in an entertaining manner that enlivened and sharpened this claim of thesis.

¹⁹³⁸ Bartosz Brożek, "Law and Defeasibility", *Revus* 23 (2014): 165–170.

In words of Francesca Poggi, the notion is “neither clear nor unanimous”, but the most widely used definition states that “legal defeasibility is that phenomenon for which a legal norm is subject to implicit exceptions that cannot be exhaustively listed *ex ante*”.¹⁹³⁹

As an illustration, take one of the most prominent examples of legal defeasibility – the case of Bologna’s barber. According to the statutory law, it was stipulated that “whoever drew blood in the streets should be severely punished”, but if a barber accidentally cut a customer in the square, it can be contended (and mostly would be) that the rule ought not to apply.¹⁹⁴⁰ Instead, judges would need to defeat the rule by not applying it and treat this situation as an implicit exception to that rule.¹⁹⁴¹

It could be said that the absurdity that legal defeasibility seeks to prevent arises when the literal wording of a legal provision contradicts with its underlying purpose.¹⁹⁴² Yet, Alessio Sardo was right in claiming that determination of what compelling reasons are for a literal meaning to be defeated is far from easy.¹⁹⁴³

In any case, Poggi convincingly pointed out that there is a tight connection between legal defeasibility and legal interpretation, emphasizing its fundamental role in legal reasoning.¹⁹⁴⁴ As she was not convinced that legal defeasibility is a special, distinctive phenomenon, she insisted that the issues traditionally linked to it are actually the issues of legal interpretation and interpretative arguments.¹⁹⁴⁵

Poggi explained that defeasible interpretation finds its role in situations when applying a law according to its literal meaning would produce an absurd or unacceptable result, which is why an exception is needed to avoid such an outcome.¹⁹⁴⁶ So, to support a defeasible interpretation, judges employ an “argument from absurdity”, in order to

¹⁹³⁹ Francesca Poggi, “Defeasibility, Law, and Argumentation: A Critical View from an Interpretative Standpoint”, *Argumentation* 35 (2021): 411. To reveal many faces of defeasibility, see Jaap Hage, “Law and Defeasibility”, *Artificial Intelligence and Law* 11 (2003): 221–243.

¹⁹⁴⁰ Poggi, “Defeasibility, Law, and Argumentation”, 412.

¹⁹⁴¹ *Ibid.* The problem with implicit exceptions is that they cannot be anticipated or predicted in advance, *ibid.*, 420.

¹⁹⁴² *Ibid.*, 423. This would be Frederick Schauer’s approach, see Frederick Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991); Frederick Schauer, “Is Defeasibility an Essential Property of Law?” in *The Logic of Legal Requirements*, ed. Jordi Ferrer Beltrán and Giovanni Battista Ratti (Oxford: Oxford University Press, 2012), 77–88. Other authors argued that this absurdity is a consequence of a conflict between norms, one of which is of implicit character, see Andrea Dolcetti and Giovanni Battista Ratti, “La Derrotabilidad Jurídica como Relación Sistemática Compleja”, *Analisi e Diritto* 2016 (2016): 35–44. Dolcetti and Ratti also insisted on the differentiation between norm-formulations (legal provisions) and norms (legal rules and principles), with the former being segments of prescriptive language and the latter being the meaning-content of the former, see Andrea Dolcetti and Giovanni Battista Ratti, “Derogation and Defeasibility in International Law”, in *Exceptions in International Law*, eds. Lorand Bartels and Federica Paddeu (Oxford: Oxford University Press, 2020), 109.

¹⁹⁴³ Alessio Sardo, “Defettibilità, Ideologia, Contesto”, in *Teoria del Diritto e Analisi Logica*, ed. Jorge Rodríguez (Madrid: Marcial Pons, 2014), 55–71.

¹⁹⁴⁴ Poggi, “Defeasibility, Law, and Argumentation”, 429. This is why she rejected the cited definition of defeasibility, claiming that it is misleading, as well as that because the term “defeasibility” is used to describe so many different phenomena, it fails to provide any meaningful explanation, *ibid.*, 430.

¹⁹⁴⁵ *Ibid.*, 430–431. Similarly, Riccardo Guastini also argued that defeasibility is merely an innovative term for restrictive interpretation, see Riccardo Guastini, “Defeasibility, Axiological Gaps, and Interpretation,” in *The Logic of Legal Requirements*, ed. Jordi Ferrer Beltrán and Giovanni Battista Ratti (Oxford: Oxford University Press, 2012), 182–92.

¹⁹⁴⁶ Poggi, “Defeasibility, Law, and Argumentation”, 421.

highlight that unacceptable outcome that applying the rule to a particular case would produce,¹⁹⁴⁷ since they need to justify their decision as they do not contain unlimited discretionary power in this regard. What is more, that absurdity can emerge from different sources, so defeasibility does not stem from a single cause.¹⁹⁴⁸

She also maintained that the “argument from absurdity” is not an autonomous interpretative argument, rather a tool for supporting the view that a particular meaning should not be assigned to a legal provision.¹⁹⁴⁹ Yet, determining the desirable meaning requires additional arguments, hence, in defeasible interpretation, various types of arguments can be employed, none of which are exclusive to defeasibility, as they are also used to justify other forms of interpretation.¹⁹⁵⁰ What meaning is desirable is evaluated based on the rule’s aim.¹⁹⁵¹

Following Poggi’s line of thought, it can be said that when judge decides that the statutory prohibition on “whoever drew blood in the streets” does not apply if a barber accidentally cuts a customer while working in the square, the meaning of the legal provision used as a premise is changed, thus, it is no longer meaning that “whoever draws blood in the streets must be severely punished,” but instead, “whoever draws blood in the streets must be severely punished except when the blood is drawn accidentally in the course of professional activity, such as barbering”.

Be that as it may, the possible predicament that defeasibility may impose on absolute human rights comes from the fact that there are authors claiming that every legal norm is defeasible.¹⁹⁵² To clearly reveal the elephant in the room, the question is whether absolute rights can be defeated, meaning whether they allow for exceptions that cannot be identified in advance, before the rule is applied.

To borrow some terminology from the philosophy of logic, a rule is defeasible if the antecedent of the norm obtains, but the deontic consequent does not follow.¹⁹⁵³ Put simply, conditions for applying the rule are met, but in a specific (exceptional) situation the rule is not applied.

Thus, if a rule declares that “no one shall be subjected to torture” and related sanction norm follows this prohibition, defeasibility will arise only when an act is classified as torture, but the legal consequence is not applied.

Since there cannot be any other rule that explicitly provides conditions under which the absolute right would not apply even when its antecedent obtains, or any other consideration embedded in some other norm that would override it, or in other words, there are no explicit exceptions to absolute rights, the only scenario in which this could occur is when the decision-maker has the discretion to decide whether to apply the rule, or in other words, it is connected to the defeasible interpretation.

¹⁹⁴⁷ Eveline T. Feteris, “Prototypical Argumentative Patterns in a Legal Context: The Role of Pragmatic Argumentation in the Justification of Judicial Decisions”, *Argumentation* 30 (2016): 61.

¹⁹⁴⁸ *Ibid*, 422.

¹⁹⁴⁹ *Ibid*, 422.

¹⁹⁵⁰ *Ibid*, 422.

¹⁹⁵¹ Feteris, “Prototypical Argumentative Patterns in a Legal Context”, 67.

¹⁹⁵² Giovanni Sartor, “Defeasibility in Legal Reasoning”, in *The Logic of Legal Requirements*, ed. Jordi Ferrer Beltrán and Giovanni Battista Ratti (Oxford: Oxford University Press, 2012), 108–136.

¹⁹⁵³ Brożek, “Law and Defeasibility”, 167.

As an example, imagine that there is a legal proceeding where an individual claims that she was a victim of torture, while state opposes that claim, arguing that the conducted behaviour cannot be considered as torture, because it lacks necessary traits to qualify as such. If the court decides that it is not a case of torture, the claim of the individual is defeated, not the norm itself. Put differently, legal reasoning concerning absolute right may be defeasible, but that does not indicate that the norm itself is.

The point is that the antecedent of the norm did not obtain, because it is fully dependant on the qualification given by the decision-maker, and it did not qualify the behaviour as torture. That is to say, the only way to defeat this absolute right would be for a judge to qualify the act as torture but to not apply a norm because of some other considerations.

Maybe there is another example worth mentioning here. Namely, in the jurisprudence of the ECtHR, there are cases where (seemingly) identical conduct was qualified as a form of ill-treatment under one set of circumstances, but not under others.

So, in one case, the strip-searching for drugs of visitors in a prison with serious drug problem, though intrusive, was not severe enough for the Court to qualify it as ill-treatment and trigger Article 3 of the ECHR.¹⁹⁵⁴

On the other hand, the Court found that routine, systematic strip-searches of a detainee that were undertaken in a maximum-security institution, carried out on a weekly basis, even if in the week preceding that he had had no contact with the outside world, and irrespective of all other strict surveillance measures, “diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him”, concluding that it amounted to (inhuman and degrading) ill-treatment.¹⁹⁵⁵

Evidently, what is at play here is a matter of legal interpretation. It is not the case that every instance of strip-searching constitutes a form of ill-treatment, but only those that meet certain level of severity do. The purpose of the norm is to safeguard human dignity, so the treatment must have the capacity to offend it for a norm to be applied. That capacity does not depend solely on the nature of the treatment itself, but also on other factors, such as the circumstances in which it was carried out, its purpose, or characteristics of the victim, such as age, sex, health, or other relevant facts. Importantly, this variability comes inside the rule, from its built-in threshold test that determines whether the antecedent of the norm obtains. And in the case where the Court, through what this thesis coined “contextual interpretative qualification”, did not find violation of the right, it was because the norm was not applicable and not because the norm was applicable but not applied. Therefore, the norm was not defeated.

Finally, let us consider a hypothetical case when the prohibition of torture would be defeated. For instance, in a ticking bomb scenario, a terrorist was in custody, and police agents stripped him naked, tied his hands behind his back, and suspended him by his arms, leaving him with paralysis in both arms, in order to compel him to reveal the location of the bomb.¹⁹⁵⁶ If the decision-maker were to qualify such treatment as torture, yet decide not to apply the prohibition in this case, and thus not to find the violation of right, because of other, external considerations, such as the protection of national security, in this instance the

¹⁹⁵⁴ ECtHR, *Wainwright v. UK*, App. 12350/04, Judgment of 26 September 2006, para. 46. The Court, however, did find a violation of Article 8 of the ECHR.

¹⁹⁵⁵ ECtHR, *Van Der Ven v. Netherlands*, App. No. 50901/99, Judgment of 4 February 2003, paras. 58-63.

¹⁹⁵⁶ This form of treatment was qualified as torture by the ECtHR in the case *Aksoy v. Turkey*, App. No. 221987/93, Judgment of 18 December 1996, para. 64.

urgent need to find the bomb and save innocent lives, then the absolute prohibition would appear to have been defeated. The problem, however, is that such a decision would simply not be legally proper.

It cannot stand, because the law recognised this prohibition as absolute, the one that knows for no exceptions, whether explicit or implicit. In legal terms, what makes it absolute is the decision of a legislator who made it so, and a decision-maker has no discretionary power to circumvent it. The difficulty with these kinds of cases, which have prompted so many scholars to contemplate them, lies in the feeling and perception that the underlying moral prohibition of torture should be defeated. Put differently, it might be said that it is morally permissible, or even morally correct, to torture the terrorist. And whether this holds true depends on the normative moral theory one adopts.

Once again, borrowing from Waldron's analysis, it can hardly be accepted that there is an objective moral truth regarding these hard cases.¹⁹⁵⁷ Not only would philosophers with the strongest moral commitments recognise that some questions require legal resolution, despite lacking a moral one, but even with the utmost goodwill from all stakeholders, moral reasoning on these issues is unlikely to yield a unified moral consensus.¹⁹⁵⁸

Law must operate and command allegiance among people who disagree about moral priorities, sometimes coherently by adopting one set of priorities through fair processes, but more often by blending competing moral views in a way that may not be perfectly consistent and appealing for some of them.¹⁹⁵⁹

Therefore, a possible (im)morality of application of absolute human rights has no bearing on the legal prohibition. It continues to stand, as absolute rights cannot be interpreted in a way that opens such broad discretionary powers for adjudicating bodies and there is simply no way around it. In other words, when it comes to absolute rights, decision-makers are not permitted to decide whether the application of the norm would lead to absurd outcomes, rather, they must apply them whenever their conditions are met and they are applicable, for that is the very essence of absoluteness.

The fact remains that, under the current regime of international human rights law, no adjudicating body has rendered, or would render, a decision aimed at defeating a norm that enshrines an absolute human right. The only way to actually remove the absolute status of such a norm must be through a systemic change, by a legislative decision to amend the norm by introducing exceptions or the possibility of restrictions. And it may be conceivable that, in the future, a different international community decides to do so, determining that certain norms, for whatever reason, no longer deserve to enjoy absolute protection. Yet such a development would not alter the theoretical framework of absolute human rights. By their very legal nature, they are indefeasible, as that is the point of their absoluteness.

* * *

In conclusion, what are absolute human rights? They are almost everything all the cited authors described. However, despite their intuitive appeal, these descriptions, which Addo

¹⁹⁵⁷ Waldron, *Torture, Terror, and Trade-Offs*, 88, 92.

¹⁹⁵⁸ *Ibid.*

¹⁹⁵⁹ *Ibid.*

and Grief creatively but accurately called “skeletal” definitions,¹⁹⁶⁰ somehow seemed to lack a substantial depth. This thesis has therefore undertaken a comprehensive analysis of interrelated legal institutes, an exercise that proved necessary in order to fully apprehend this phenomenon and offer its complete, meaningful framework.

So, it is true that absolute rights know no exceptions, that their underlying significance warrants the highest level of protection, that no conflict can arise between absolute rights and that, in any conflict with relative rights, they will always prevail. It is also true that there can be no justification for their non-application in cases where they are applicable.

But they possess all these qualities because, in the words of this thesis, absolute human rights are rights that protect against certain acts by categorical prohibitions and cannot be subject to human rights restrictions - meaning that they are non-derogable, contain neither a limitation clause nor implicit limitations and include no pinpoint exceptions - while also remaining exempt from the proportionality analysis and inderfeasible.

Evidently, this definition aligns closely to Mavronicola’s perspective on absolute rights, where she stated that they are legally non-displaceable, as they are not subject to exceptions, justification or derogation.¹⁹⁶¹ However, drawing on the jurisprudence of the ECtHR, she also singled out another element of the definition, namely that absolute right apply “irrespective of the victim’s conduct”.¹⁹⁶² This element was not incorporated into this thesis’s framework, for the simple reason that this is not a *differentia specifica* of absolute human rights, since all human rights belong to all human beings, regardless of their conduct or characteristics. While specific conduct may lead to justified restrictions of certain human rights, such as in the case of lawful detention of a person after conviction, which is one of the pinpoint exceptions to the right to liberty and security, the person at hand would not lose the right itself, rather it would just be restricted in that very situation. Therefore, people enjoy all human rights, absolute and relative, irrespective of their conduct. In addition, the fact remains, as already stated, that any restriction of absolute rights is impermissible, so emphasising this element seems to be redundant.

Owing to the definition offered by this thesis, the nature of absolute rights can be more precisely discerned, which further illuminates how to afford them stronger protection and how to identify and address shortcomings in judicial reasoning concerning these rights. Finally, this framework also makes it possible to determine which rights are absolute. To reach such a finding, it is necessary to examine all of the proposed elements and assess whether each of them is satisfied. This is precisely what will be undertaken in the remainder of this chapter.

5. Which Rights Are Absolute Human Rights?

The previous chapter provided an in-depth analysis on how adjudicating bodies approach non-derogable rights from the perspective of their potential absoluteness. Now that a theoretical framework for absolute human rights has been set out, it is time to examine

¹⁹⁶⁰ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?,” 516.

¹⁹⁶¹ Mavronicola, “Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute”, 3.

¹⁹⁶² *Ibid*, 11.

whether those rights fulfil the elements of the proposed definition. After all, as Neuman correctly observed, absoluteness result “from a combination of wording and interpretation”,¹⁹⁶³ and this should be borne in mind whenever one considers whether a right is absolute or not.

To start with, perhaps the most challenging case is that of the right to life. The right to life is non-derogable under all of the analysed human rights regimes, it contains no limitation clauses, and it has not been held to admit any implicit limitations.

However, according to the ECHR, it does contain pinpoint exceptions that necessarily entail a proportionality analysis, as confirmed in the jurisprudence of the ECtHR, notwithstanding its occasional explicit declaration that it is an absolute right.¹⁹⁶⁴ So, despite the fact that the death penalty is no longer considered to be an explicit exception to this right within the Strasbourg regime, at least two elements of the definition are not met.

On the other hand, both the HRC and the IAtHR openly proclaimed that the right to life is not absolute.¹⁹⁶⁵ Even though there are no pinpoint exceptions in the normative wording of the treaties, both regimes have applied proportionality in their case-law correspondingly to the ECtHR reasoning,¹⁹⁶⁶ and unfortunately, they still retain the death penalty.

Thus, the right to life cannot be considered absolute, not only because it has been balanced against competing interests by all of the monitoring bodies and contains pinpoint exceptions under the ECHR, but also because it fails to satisfy the first element of the definition, as it is not a negative injunction.

That said, all of the respective treaties contain a negative aspect of the right to life, in the form of the prohibition, stating that “no one shall arbitrarily be deprived of his life”, which is confirmed to be absolute in the relevant case-law. So, the term “arbitrarily” distinguishes between permissible and impermissible forms of execution and leaves room for the death penalty, thereby drastically narrowing the scope of the right, which, nevertheless, will enjoy absolute protection. In other words, there is a threshold within the right itself, which the decision-makers will be required to assess through interpretation.

In conclusion, it can be said that the prohibition on arbitrary deprivation of life is absolute under all three assessed human rights regimes,¹⁹⁶⁷ while the prohibition of death penalty is also absolute, but only within the ECHR.

Now, the paradigmatic example of an absolute rights is certainly the prohibition of torture, (cruel,) inhuman or degrading treatment or punishment. It is a negative obligation that is not subject to human rights restrictions, exempt from proportionality analysis, and infeasible, thereby meeting all elements of the definition across all human rights systems. This has been confirmed numerous times in a consistent jurisprudence of the monitoring

¹⁹⁶³ Neuman, “Constrained Derogation in Positive Human Rights Regimes”, 19.

¹⁹⁶⁴ ECtHR, *F.G. v. Sweden*, paras. 127, 156.

¹⁹⁶⁵ HRC, *CCPR General Comment No. 36*, para. 10; IACtHR, *Artavia Murillo and others (“In Vitro Fertilization”) v. Costa Rica*, para. 264.

¹⁹⁶⁶ HRC, *CCPR General Comment No. 36*, para. 12; IACtHR, *Artavia Murillo and others (“In Vitro Fertilization”) v. Costa Rica*, para. 260.

¹⁹⁶⁷ This prohibition also includes the absolute prohibition on forced disappearances, which is particularly important for the context of the IACHR, see IACommHR, *Report on the situation of human rights defenders in the Americas*, para. 45.

bodies.¹⁹⁶⁸ Additionally, since the prohibition of *refoulement* derives from the prohibition of torture, it is absolute as well.

The same stands for the prohibition of slavery and servitude, a non-derogable right under all three derogation clauses, without explicit or implicit limitations, which is not subjected to the proportionality test in the case-law and is treated as indefeasible. However, apart from the IACtHR,¹⁹⁶⁹ monitoring bodies rarely acknowledged it being absolute, even though it is and they have factually approached it as such.

It goes without saying that this does not apply to the prohibition of forced or compulsory labour, which is traditionally part of the same article but contains pinpoint exceptions and, therefore, allows for the proportionality test. This is worth mentioning here explicitly, because under the ACHR, not only the prohibition of slavery and servitude but also the prohibition of forced or compulsory labour is non-derogable, yet it cannot be considered absolute, at least within the framework developed in this thesis.

When it comes to the prohibition of *ex post facto* laws, it is a categorical prohibition that is non-derogable under all analysed regimes and does not contain a limitation clause, nor did monitoring bodies allowed for implicit limitations.

The only potential issue could be the “Nuremberg clause”, which has been added to both the ECHR and ICCPR, in order to specify that it is allowed for states to impose punishment for acts or omissions that were not criminalised under domestic law at the time of the commission but were nevertheless contrary to the international law. As already explained, this should not be treated as a form of (pinpoint) exception, but an interpretation clause, or in the words of the ECtHR “only a contextual clarification of the liability limb of that rule”.

¹⁹⁷⁰

Moreover, no balancing exercise has been applied to this prohibition in the jurisprudence, which is most strikingly evident in the recent advisory opinion of the ECtHR, where it deliberated whether the prohibition of torture could justify setting aside statutory limitation periods in order to prosecute acts amounting to torture or other ill-treatment, and the Court held that Article 7, which enshrines the principle of legality, precludes the revival of time-barred prosecutions.¹⁹⁷¹ To cite the Court on the matter, “it would be unacceptable for the national authorities to compensate for the failure to discharge their positive obligations under Article 3 of the Convention at the expense of the guarantees of Article 7, one of which is that the criminal law must not be construed extensively to an accused’s detriment”.¹⁹⁷² With this kind of interpretation, the Court clearly underlined that the prohibition of *ex post facto* laws cannot be balanced against other rights, even if they are part of the provision with absolute character, as well as that it has an indefeasible nature, hence that it is absolute itself.

¹⁹⁶⁸ See for instance ECHR, *Soering v. UK*, para. 88; IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, para. 89.

¹⁹⁶⁹ IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, para. 243.

¹⁹⁷⁰ ECtHR, *Maktouf and Damjanović*, para. 189

¹⁹⁷¹ ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment*, paras. 56, 77.

¹⁹⁷² *Ibid*, para. 65.

With regard to the other investigated regimes, there are no indications in practice that a different line of reasoning should be adopted, or in other words, all elements of absoluteness appear to be fulfilled for this right.

On the other hand, things are largely different with the prohibition of *ne bis in idem*. *Prima facie*, the treaties guarantee it in the form of an unqualified negative injunction, with the sole exception being the ECHR, which contains a type of interpretative clause that “sets a limit on the application of the principle of legal certainty in criminal matters”.¹⁹⁷³ Hence, it does not constitute an obstacle to absoluteness. In addition, there is no limitation clause, nor pinpoint exceptions, within the treaties.

However, both the ECtHR and the IACtHR have recognised exceptions to *ne bis in idem* in their case-law, permitting a trial to be repeated in cases that violate the prohibition of amnesties for grave breaches of fundamental human rights, for example, where the acquittal was intended to shield the accused from criminal liability, where there was no genuine intention to bring the responsible party to justice, or where the final judgment was issued in breach of the guarantees of competence, independence, and impartiality.¹⁹⁷⁴ What is more, the IACtHR underlined that this is not an absolute right,¹⁹⁷⁵ and to cite it on the matter, “the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle”.¹⁹⁷⁶ This clearly indicates a balancing exercise, that is, a recognition that this prohibition may be overridden by other rights and considerations, and thus it cannot be regarded as absolute under these human right systems.

Finally, the preceding chapter set out a thorough analysis of the freedom of thought, conscience, and religion, hence its findings need to be tested against the conceptualised framework of absolute rights.

First of all, under the ECtHR, this is not a non-derogable right, despite the fact that the Court stated that *forum internum* of this freedom is absolute.¹⁹⁷⁷ The underlying reason behind its absence from the derogation clause is probably in the practical impossibility to restrain internal aspect of this freedom, but that still does not change the unfortunate fact that it lacks this element of absoluteness.

In contrast, under the ICCPR, the freedom of thought, conscience, and religion is non-derogable in its entirety, but it does contain a limitation clause with regard to the *forum externum* of the freedom.

There are no implicit limitations, pinpoint exceptions or any traces of the proportionality test related to the internal part of the freedom, and it appears to be indefeasible. Therefore, only *forum internum* aspect is unqualified and it gives birth to an absolute right, which

¹⁹⁷³ ECtHR, *Mihalache v. Romania*, para. 129.

¹⁹⁷⁴ ECtHR, *Marguš v. Croatia*, para. 136; IACtHR, *Almonacid-Arellano et al. v. Chile*, para. 154.

¹⁹⁷⁵ IACtHR, *Almonacid-Arellano et al. v. Chile*, para. 154.

¹⁹⁷⁶ *Ibid.*

¹⁹⁷⁷ ECtHR, *Eweida and Others v. UK*, para. 80. It must be acknowledged that the ECtHR could, in principle, proclaim certain rights as non-derogable, even though they are not designated as such in the text of the ECHR, analogously to the approach of the HRC in this regard. Following this extensive approach, it is conceivable that, by admitting the *forum internum* an absolute status, the ECtHR has implicitly included it among non-derogable rights, thereby removing any obstacle for its classification as absolute human right within this thesis's framework. Another possible explanation would be that the ECtHR has considered it to be non-derogable due to the fact that it is factually so, but it would be preferable for the Court to state this explicitly.

should be read as a prohibition of any interference with one's thought, conscience and religion.¹⁹⁷⁸ The absolute status was upheld by both the HRC and the UN Special Rapporteur on freedom of religion or belief on several occasions.¹⁹⁷⁹

Under the ICCPR, there is another unconditional negative obligation within this freedom, aligned with the elements of absolute rights and explicitly declared absolute by the HRC,¹⁹⁸⁰ and that is the prohibition of coercion which would impair freedom to have or to adopt a religion or belief of one's choice.

Ultimately, as the HRC has also proclaimed the freedom of opinion to be non-derogable,¹⁹⁸¹ confirming that it does not contain restrictions,¹⁹⁸² hence, on analogous grounds to the prohibition of interference with one's thought, there are no obstacles not to consider the prohibition of interference with one's opinion as an absolute right under the ICCPR.

The status of this freedom is somewhat different within the ACHR. Its only non-derogable parts under this treaty are the freedom of conscience and religion, as the freedom of thought is protected under the article that is not only derogable but also contains a limitations clause which, for some reason, refers to both thought and expression. Therefore, apart from the prohibition of any interference with one's conscience and religion, which safeguards *forum internum*, there is only one other unconditional prohibition that could be considered absolute, similar to the ICCPR, and that is the prohibition of restrictions that might impair one's freedom to maintain or to change his religion or beliefs.

Last but not least, the right to juridical personality is not explicitly recognised by the ECHR, hence it is not among non-derogable rights, but the research results have indicated that it is generally considered to be an indispensable condition for holding or exercising any other human rights. Put differently, it relates not only to the formal legal status but also to the effective ability to access rights and remedies within the legal system, thereby constituting a prerequisite for the enjoyment of any other right. This has been explicitly underlined by the HRC and the IACtHR, and they have recognised its inextricable link with another absolute right, namely the prohibition of forced disappearances,¹⁹⁸³ and the same could be said for the absolute prohibition of slavery, as it also, by its very nature, negates one's juridical personality. Therefore, unconditional protection of this right is a structural precondition for the realisation of other rights, including those that are absolute.

As it is a non-derogable right under both the ICCPR and the ACHR, not subject to restrictions, with no scope for balancing it against competing interests and no doubt as to

¹⁹⁷⁸ In words of the UN Special Rapporteur on freedom of religion or belief, "States legally cannot ever interfere with freedom of thought", see United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 4.

¹⁹⁷⁹ See, for instance, HRC, CCPR General Comment No. 22, para. 3; UN Human Rights Council, *Freedom of Religion or Belief and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur on Freedom of Religion or Belief, Nazila Ghanea*, para. 20.

¹⁹⁸⁰ United Nations, General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, para. 29.

¹⁹⁸¹ HRC, CCPR General Comment No. 34, para. 5.

¹⁹⁸² *Ibid*, para. 9.

¹⁹⁸³ HRC, *Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche v. Algeria*; IACtHR, *Anzualdo Castro v. Peru*, para. 101.

its inderfeasible status, there are no obstacles to concluding that, under these treaties, the prohibition of denying recognition as a person before the law is an absolute right.

To conclude, this has been an overview of the identified absolute rights, which are set within the proposed theoretical framework and, drawing on the case-law and interpretation of the relevant international bodies, are found to meet the previously established elements for their qualification as absolute rights.

When it comes to other rights examined within the previous chapter, such as rights of the family, the right to a name, rights of the child, the right to nationality or the right to participate in government, it has either been shown that they do not fulfil some of the elements necessary for absoluteness, since, for example, some of them are derogable, or they have been explicitly denied absolute status in the case-law of the monitoring bodies, or there is simply insufficient evidence that they meet the requirements of the definition.

Take, for instance, the prohibition of imprisonment for inability to fulfil a contractual obligation, which is non-derogable under the ICCPR, conceptualised in unqualified terms and subject to no restrictions. Yet, without a general comment from the HRC regarding the nature of this right, it cannot be conclusively stated whether it is susceptible to proportionality and whether it can be defeated in judicial practice. Judging by the comparative treatment of this right, it is conceivable that exceptions could be introduced with respect to this right, just as the ACHR explicitly provides one concerning the orders of a competent judicial authority issued for nonfulfillment of duties of support,¹⁹⁸⁴ raising the question of why the HRC would not permit similar type of right's restriction.

The presented list, of course, is not intended to be exhaustive of all absolute rights within international law, or even within the analysed treaties. After all, the HRC has also proclaimed the right to be tried by an independent and impartial tribunal as an absolute right,¹⁹⁸⁵ while the IACtHR likewise placed substantial value on some of the "essential" judicial remedies for the protection of non-derogable rights.¹⁹⁸⁶ It is yet to be seen whether the progressive development of international law and evolutive interpretation will actually elevate them, or some others, to the standing of absolute rights.

Nevertheless, with regard to the rights discussed, it can be stated with confidence that they constitute absolute rights, as this conclusion has been substantiated by appropriate reasoning and supported by extracts from relevant jurisprudence.

¹⁹⁸⁴ Article 7, para. 7 of the ACHR.

¹⁹⁸⁵ HRC, *Gonzalez del Rio v. Peru*, para. 5.2; HRC, *CCPR General Comment No. 32*, para. 19.

¹⁹⁸⁶ IACtHR, *Advisory Opinion OC-8/87*, para. 27.

V ABSOLUTE HUMAN RIGHTS AS A CONTRIBUTION TO THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

It is hardly possible to overlook that, throughout the preceding analysis of the thesis, especially in the sections citing the relevant practice of international courts and quasi-judicial bodies, the term *jus cogens* norms has appeared multiple times. This recurring reference naturally calls for the examination of the relationship between *jus cogens* norms (hereinafter also: peremptory norms) and absolute human rights, which will be conducted in this concluding chapter. This question is all the more relevant since, in both doctrine and practice, these two concepts are frequently confused, they overlap, or are even treated as the same thing. By addressing their intersection, this final endeavour seeks to contribute to the broader discourse on normative hierarchy in international law, while also aiming to position absolute human rights within that framework.

1. Drawing a Line in the Sand – Understanding *Jus Cogens*

Defining *jus cogens* norms is hardly an uncomplicated matter. This was also acknowledged by the ILC when it decided to address the topic as part of its programme, expressly noting that the scope and legal implications of these norms are still ambiguous and subject to debate.¹⁹⁸⁷

Before all else, it is worth reminding that Article 53 of the VCLT sets out the only written legal definition of the effects of *jus cogens* norms, stipulating that “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.¹⁹⁸⁸

Consequently, there are two cumulative criteria for the ascertainment¹⁹⁸⁹ of *jus cogens*, the first one being that the norm in question must be a norm of general international law and the second one requiring that the norm must be accepted and recognised by the international community of states as a whole as one from which no derogation is permitted.¹⁹⁹⁰

¹⁹⁸⁷ United Nations, International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, Official Records of the General Assembly, Sixty-Ninth Session, Supplement No. 10, UN Doc. A/69/10 (2014), Annex, para. 3.

¹⁹⁸⁸ Article 64 of the VCLT provides that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

¹⁹⁸⁹ This thesis accepts the distinction made by Miodrag Jovanović between ascertainment and identification of *jus cogens* norms, since a particular norm can be identified as *jus cogens* only after it has been ascertained that it meets the established criteria for achieving the peremptory status, Miodrag A. Jovanović, “*Jus Cogens: A Complex Case of Constitutional Reasoning in International Law*”, *Rechtsphilosophie – Zeitschrift für die Grundlagen des Rechts*, 3 (2020): 255.

¹⁹⁹⁰ International Law Commission, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, 16 March 2017, A/CN.4/706, para. 37. The provision indicating that a norm may be altered only by a subsequent norm of

So, primarily, the norm must be part of general international law, and subsequently, it must be elevated to the status of *jus cogens*.¹⁹⁹¹ General international law consists of norms that are binding on all members of the international community,¹⁹⁹² most commonly stemming from customary international law, but additionally, all other relevant sources laid down in Article 38 of the Statute of the ICJ should be seen as complementary to one another rather than mutually exclusive.¹⁹⁹³

Once a norm has been established as part of general international law, the subsequent task is to determine whether it is accepted and recognised by the international community as a non-derogable one. The ILC Special Rapporteur has also endorsed this concept of “double acceptance”, which entails an initial acceptance of the norm as belonging to general international law, followed by recognition of its specific attribute of non-derogability (*opinio juris cogentis*).¹⁹⁹⁴

Given that it cannot be expected for every state in a literal sense to declare whether it accepts a particular norm as having this elevated status, it may be assumed that the norm is accepted as peremptory if it has been recognised as such by two-thirds of states, including the most powerful states in economic and military terms.¹⁹⁹⁵ This is because the criterion is not only quantitative, but also qualitative, which is precisely why it is not only important how many states accepted the practice, but also which states did so.¹⁹⁹⁶

Finally, after formal features of peremptory norms are established through the ascertainment procedure, the identification of *jus cogens* norms may proceed. Since ascertaining given requirements, especially *opinio juris cogentis*, is a demanding task that requires a comprehensive analysis of various sources and materials, such as treaty provisions and resolutions, official state statements, government publications, legal opinions, diplomatic correspondence, and rulings of national courts,¹⁹⁹⁷ scholars correctly claimed that it is up to the competent adjudicative body to identify an applicable *jus cogens* norm in the particular case before it.¹⁹⁹⁸

general international law of the same character has been rightly understood as describing the process for modifying a *jus cogens* norm, rather than as an independent criterion for its ascertainment, *ibid*.

¹⁹⁹¹ *Ibid*, para. 40.

¹⁹⁹² Lassa Oppenheim, *International Law: A Thesis*, Vol. 1 (London: Longmans, Green, 1948), 4–5.

¹⁹⁹³ *Statute of the International Court of Justice*, 26 June 1945, 33 U.N.T.S. 993; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 127. For more on general international law see Ana Zdravković, “Finding the Core of International Law – *Jus Cogens* in the Work of the International Law Commission”, in *South Eastern Europe and the European Union – Legal Issues*, Vol. 5 (Graz: Verlag Alma Mater, 2019), 142–159.

¹⁹⁹⁴ International Law Commission, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, para. 77; See also Erika de Wet, “Jus Cogens and Obligations Erga Omnes,” in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 542.

¹⁹⁹⁵ This is analogous to a proposal found in the literature regarding the formation of customary international law, see Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1999), 34, 35. See also, Ivana Krstić, *Univerzalna nadležnost u međunarodnom pravu za teške povrede ljudskih prava* (Beograd: Pravni fakultet Univerziteta u Beogradu, 2013), 88.

¹⁹⁹⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005), xliv.

¹⁹⁹⁷ International Law Commission, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, para. 83.

¹⁹⁹⁸ Jovanović, “*Jus Cogens*”, 255, 261.

However, it has also been argued that the practice indicates that it is not sufficient for any adjudicating body to identify a norm as having a peremptory nature, but rather that this role rests solely on the standings of the ICJ.¹⁹⁹⁹ This view is based on the fact that, when considering candidate norms for *jus cogens* status, the ILC Special Rapporteur has placed the greatest weight on the ICJ's positions on the matter. That is, even though reports took into account all other relevant materials and proofs concerning the nature of the given norm, the first argument was almost always drawn from the case law of the ICJ, regardless of whether the Court has expressly affirmed the peremptory status of a norm (as in the prohibitions of aggression, torture, genocide and crimes against humanity²⁰⁰⁰), or has done so indirectly by including the norm among those giving rise to *erga omnes* obligations (the prohibition of apartheid and racial discrimination, the prohibition of slavery and the right to self-determination) or by describing certain rules as "intransgressible" (the basic rules of international humanitarian law).²⁰⁰¹

Those were the only norms that found their place in the illustrative list offered by the ILC Special Rapporteur, despite the fact that other norms, such as the prohibition of enforced disappearance, the principle of *non-refoulement* or the prohibition of discrimination, were also considered and supported by very similar evidence of their imperative status and even proclaimed as peremptory norms by some other international adjudicating bodies.²⁰⁰² The sole distinction is that the ICJ has not yet classified them as *jus cogens* norms, which is why the ILC Special Rapporteur likewise refrained from assigning them such status.²⁰⁰³

Unfortunately, although it was emphasised that the illustrative list is not exhaustive, and while the decision to incorporate such a list could be considered commendable, it is likely that one of its implications will be that all norms omitted from it will, in general, be regarded as not yet having *jus cogens* status.²⁰⁰⁴ What the list does reveal, however, is the indispensable role of the ICJ in the process of identifying *jus cogens* norms.²⁰⁰⁵

Framed in these terms, the threshold for a norm to acquire *jus cogens* status is exceptionally demanding, as it should be, since such norms embody the will, fundamental interests, and moral conscience of the entire international community, and cannot be subject to derogation.²⁰⁰⁶

¹⁹⁹⁹ Zdravković, "Finding the Core of International Law", 151-156. For a more detailed elaboration on this claim see Zdravković, "Međunarodni sud pravde", 155-174.

²⁰⁰⁰ The ICJ has in fact never expressly classified the prohibition of crimes against humanity as a *jus cogens* norm. Nevertheless, the Special Rapporteur has argued that, given the Court's recognition of the prohibition of torture as *jus cogens*, it follows *a fortiori* that prohibiting its commission on a widespread or systematic scale, amounting to crimes against humanity, would likewise possess *jus cogens* status, see United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 84.

²⁰⁰¹ Zdravković, "Finding the Core of International Law", 151-152. See United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, paras. 63-64, 69, 79, 84, 92-93, 102, 109, 117.

²⁰⁰² United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 125-127, 131-133, 135.

²⁰⁰³ Zdravković, "Finding the Core of International Law", 155.

²⁰⁰⁴ *Ibid.*

²⁰⁰⁵ *Ibid.*

²⁰⁰⁶ *Ibid.*, 150.

Ultimately, it is true that *jus cogens* norms serve as a shield for the moral core of the international community. According to the ILC, this distinctive nature of the subject matter of these norms is what imparts to them a character of *jus cogens*.²⁰⁰⁷ There is no surprise then that the very first ILC report on peremptory norms, emphasised that “*jus cogens* norms serve to protect fundamental values of the international community – what has often been described as international *ordre public* or public order”,²⁰⁰⁸ and that “the values which are protected by *jus cogens* norms ... are concerned with the *basic considerations of humanity*”²⁰⁰⁹. Such norms are indispensable for the “social coexistence of the international community”.²⁰¹⁰

Therefore, if nothing else, it may be concluded that, at least in case of *jus cogens* norms, non-derogability follows undisputably from the “value-oriented” approach, or in other words, values they protect are of such fundamental importance for the international community that their legal protection can never be suspended.

2. *Jus Cogens* v. Absolute Human Rights

Previous analysis has indicated that *jus cogens* norms and absolute human rights conceptually overlap to a considerable degree, while the chapter dedicated to finding absolute human rights in the jurisprudence of international courts and quasi-judicial bodies has shown that these institutions often conflate the two or even use the terms interchangeably. To illustrate, from the fact that absolute rights do not allow for exceptions and derogations, Addo and Grief concluded that absolute rights constitute *jus cogens*,²⁰¹¹ treating them as basically synonymous. This could have been expected, based on the fact that the two concepts share common features, most notably their non-derogable character and the importance of the values they protect, particularly in light of the central role of human dignity, which both *jus cogens* norms and absolute rights seek to protect. It was back in 1958, when Sir Gerald Fitzmaurice anticipated that *jus cogens* embodies absolute obligations, because all rules of this nature are designed directly for the benefit of individuals as human beings, on humanitarian grounds and not primarily for the benefit of states.²⁰¹² To borrow words from Alfred Verdross, *jus cogens* rules are absolute because they serve the higher interests of the international community, and not the needs of individual states.²⁰¹³

²⁰⁰⁷ International Law Commission, *Yearbook of the International Law Commission* 1966, Vol. II: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session, UN Doc. A/CN.4/SER.A/1966/Add.1 (New York: United Nations, 1967), 248, para. 2.

²⁰⁰⁸ United Nations, International Law Commission, *First report on peremptory norms of general international law (jus cogens)* by Dire Tladi, Special Rapporteur, A/CN.4/693, 12 August 2016, para. 63.

²⁰⁰⁹ *Ibid*, para. 71.

²⁰¹⁰ Thomas Weatherall, *Jus Cogens - International Law and Social Contract* (Cambridge University Press, 2015), 100.

²⁰¹¹ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, 516.

²⁰¹² Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*. Leiden: A. W. Sijthoff, 1958, 125. See also Koji, “Emerging Hierarchy”, 939.

²⁰¹³ Alfred Verdross, “*Jus Dispositivum* and *Jus Cogens* in International Law,” *American Journal of International Law* 60 (1966): 58.

However, the extent of confusion in both doctrine and case-law is striking and underscores the need to highlight their distinctions.

Take, for example, the views of the HRC. Although references to absolute rights are not abundant in its remarks, the term was used with regard to Article 4 of the ICCPR, when the HRC added certain provisions to the list of non-derogable rights and stated that the absolute nature of some of them is justified “by their status as norms of general international law”.²⁰¹⁴

To start with, the HRC appears to have directly linked the absoluteness of rights with their non-derogable trait, although it remains unclear why it allowed the impression that non-derogability automatically implies absoluteness.

The second, and perhaps even more interesting point concerns the HRC’s reference to the general international law. Given that the exact meaning of the general international law is disputed,²⁰¹⁵ which was confirmed by the Study Group on fragmentation of international law established by the ILC,²⁰¹⁶ the motivation behind invoking the “general international law” origin of these norms seems a bit curious. Certainly, not all norms belonging to the realm of general international law can be considered absolute, thus that is not an appropriate explanation. However, only a norm of general international law can become a peremptory norm of international law. To recall, the HRC stated that the provision at hand should be considered non-derogable, as it is absolute, while its absolute nature is justified by its being a part of general international law. Well, as previously explained, in international law there is a name for such a norm, but for some reason that name is very often avoided. International organs are traditionally reluctant to qualify norms as *jus cogens*, and this appears to be the case regarding this aspect of the HRC’s position as well. It could have stated that the justification of provision’s non-derogability is in its peremptory status, but it preferred not to. Instead, it resorted to the absolute nature and offered a mixture of concepts that only deepened the confusion among these already overlapping terms.

To leave no stone unturned, the HRC did clarify that the enumeration of non-derogable rights “is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law”.²⁰¹⁷ In that regard, it added no fresh insight or clarification and simply repeated what was already obvious.

The observation regarding the reluctance of international courts to proclaim norms to be *jus cogens* does not hold true for the IACtHR. On the contrary, the Court has often adopted a rather extensive understanding of peremptory norms and generously conferred this status in its jurisprudence. For example, in one of its advisory opinions, it has stated that the principles of equality before the law and non-discrimination bind all state actions in ensuring human rights, hence that they may be considered peremptory under general international law, since they apply to all states, regardless of treaty membership, while also

²⁰¹⁴ UN Human Rights Committee, *CCPR General Comment No. 29*, para. 13(b).

²⁰¹⁵ Josef L. Kunz insisted that general international law can be created solely by a custom, Josef L. Kunz, “General International Law and the Law of International Organizations”, *American Journal of International Law* (1953): 457. Contrary to this view, Grigory Tunkin was convinced that general international law comprises both customary and conventional rules. Grigory Tunkin, “Is General International Law Customary Law Only?”, *European Journal of International Law* (1993): 541.

²⁰¹⁶ United Nations, International Law Commission, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, para. 41.

²⁰¹⁷ HRC, *CCPR General Comment No. 29*, para. 11.

having impact on third parties, including individuals.²⁰¹⁸ It further reaffirmed once again that, being a part of general international law, the principles of equality and non-discrimination possess *jus cogens* norms.²⁰¹⁹

Evidently, the IACtHR disregarded the fact that these principles are not listed as non-derogable under the ACHR. Even if it considered them to be non-derogable, or, for instance, part of the judicial guarantees essential for the protection of non-derogable rights, which themselves cannot be derogated, it should have stated so explicitly. Based on the written quotation, there appears to be no distinction between an international customary norm and a *jus cogens* norm, as both form part of general international law and, once established, apply irrespective of whether the state is party to a particular treaty or not.²⁰²⁰

Furthermore, the analysis offered in this thesis has illustrated that the case-law of the bodies monitoring the Inter-American human rights system explicitly recognised the right to life,²⁰²¹ the prohibition of forced disappearance,²⁰²² the prohibition of torture,²⁰²³ and the prohibition of slavery and similar practices,²⁰²⁴ as *jus cogens* norms. This approach differs dramatically from other analysed institutions, which have most often admitted such status solely to the prohibition of torture (cruel, inhuman or degrading treatment or punishment).²⁰²⁵

In any case, it is worth repeating that the IACtHR has on a number of occasions employed the terms *jus cogens* and non-derogable rights nearly synonymously, as evident from the formulations such as “the torture and forced disappearance of the alleged victims, the prohibition of which is a non-derogable provision of international law or *jus cogens*”²⁰²⁶, as well as its statement that “the facts of this case have violated non-derogable provisions of international law (*jus cogens*)”²⁰²⁷.

These findings warrant a few conceptual remarks. It was already stated that *jus cogens* norms and absolute human rights have a few common characteristics. This thesis proposed that absolute human rights should be understood as prohibitive legal commands that cannot be subject to human rights restrictions, including derogations, while also remaining exempt from the proportionality analysis and indefeasible. It was also indicated that it naturally follows that they enjoy the highest level of protection because their safeguarded values, primarily human dignity, are recognised by a given legal system or a community as the most important and therefore deserving to be inviolable in all circumstances.

Therefore, these meta-norms share at least several traits, such as non-derogable status and the fundamental importance of values they protect. Koji shared the similar view, arguing that non-derogable rights and *jus cogens* norms overlap when the former are

²⁰¹⁸ IACtHR, Advisory Opinion OC-18/03 “Juridical Condition and Rights of Undocumented Migrants”, para. 100.

²⁰¹⁹ *Ibid*, para. 101.

²⁰²⁰ Except to the persistent objector in case of customary norms.

²⁰²¹ IACtHR, *Niños de la Calle v. Guatemala*, para. 139.

²⁰²² IACtHR, *Goiburú et al. v. Paraguay*, para. 84.

²⁰²³ IACtHR, *Baldeón García v. Peru*, para. 117.

²⁰²⁴ IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, para. 209.

²⁰²⁵ ECtHR, *Al-Adsani v. UK*, paras. 60-61; HRC, *CCPR General Comment No. 29*, para. 11.

²⁰²⁶ IACtHR, *Goiburú et al. v. Paraguay*, para. 93.

²⁰²⁷ *Ibid*, para. 128.

identified through the value-oriented approach.²⁰²⁸ Moreover, both absolute rights and *jus cogens* norms should be understood as indefeasible.²⁰²⁹ Yet they are by no means the same thing.

First of all, the analysis in the previous chapter concluded that various regional systems may regard different human rights as absolute. There is no impediment for a particular human rights regime to choose to afford such protection to certain values that they consider so paramount as to merit the absolute status.

This means that not every absolute right will meet the requirement of being accepted and recognised by the whole international community as a non-derogable one, deserving of peremptory standing. However, attaining absolute status is certainly one step closer to achieving the peremptory one.

Put differently, it is conceivable that a regional human rights system assigns absolute protection to a certain right that is fundamentally important for its legal tradition, and that, over time, this will inspire others and they would also come to regard that same right as absolute.²⁰³⁰ It can hardly be contested that this very process would constitute a clear pathway towards the emergence of a *jus cogens* norm. In words of Koji, *jus cogens* must include common elements among major different (legal) cultures,²⁰³¹ and this is exactly what is being achieved in the described process.

In addition, this idea is supported by the fact that rights identified as absolute across all the examined systems, namely the prohibition on arbitrary deprivation of life (including the absolute prohibition on forced disappearances), the prohibition of torture, (cruel,) inhuman or degrading treatment or punishment, the prohibition of slavery and servitude and the prohibition of *ex post facto* laws have also been considered to be *jus cogens* norms.²⁰³² Almost all of these rights found their place in the illustrative list of the ILC, either explicitly or as part of international crimes that are constructed in order to protect absolute human rights.²⁰³³

So, in short, all human rights related *jus cogens* norms are absolute rights, but not all absolute rights are *jus cogens* norms (yet).

²⁰²⁸ Koji, "Emerging Hierarchy", 931.

²⁰²⁹ Dolcetti and Ratti noted that "Article 53 appears to express a norm that characterises peremptory norms as always indefeasible", but also offered interesting scrutinising of the concept, see Dolcetti and Ratti, "Derogation and Defeasibility in International Law", 120.

²⁰³⁰ This could be argued for the prohibition of forced disappearance in the Inter-American system of human rights.

²⁰³¹

²⁰³² *Ibid*, 927. Henry Steiner took a view that the repeated inclusion of certain rights in lists of non-derogable rights may indicate the presence of *opinio juris*, an essential element for the formation of customary legal norms Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2008), 388. Although this is correct, it must be taken into account that these are not ordinary norms, but specific, non-derogable ones, making it more likely to be the indication of *opinio juris cogentis*.

²⁰³³ Those are the prohibitions of aggression, torture, slavery, genocide and crimes against humanity, see

United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 60. For a view that there is a connection between international crimes and absolute human rights see Krstić, *Univerzalna nadležnost u međunarodnom pravu za teške povrede ljudskih prava*, 147.

3. Regional *Jus Cogens* v. Absolute Human Rights

Finally, one last remark is needed with regard to the peremptory norms. Some scholars have claimed that *jus cogens* norms could also be regional, as it is apparently sufficient to have agreement between states that a particular rule may not be derogated from.²⁰³⁴

However, as discussed earlier, by definition, *jus cogens* norms must be part of general international law and be accepted and recognised by the international community of states as a whole as non-derogable, which leaves no room for a norm to be regional and accepted by the whole world at the same time.²⁰³⁵ Similar conclusion that the practice of states does not support the notion of regional *jus cogens* was indicated by the ILC Special Rapporteur, who additionally described many difficulties related to this idea.²⁰³⁶

Plainly said, regional *jus cogens* norms are incompatible with the very definition of peremptoriness in international law, hence they represent no more than *contradictio in adjecto*.²⁰³⁷

However, it is possible that a group of states may share a set of moral values underpinning norms that they regard as more important than others, and that such norms could vary across different regions. As the ILC Special Rapporteur described it, such special norms may emerge from “a common identity forged by membership of a common community”.²⁰³⁸ Yet, these are not peremptory norms of international law, rather, within the field of human rights law, these are norms containing absolute human rights.

In light of the foregoing, the notion of regional *jus cogens* does not withstand conceptual scrutiny, since a norm confined to a particular region, however paramount for that particular context, cannot satisfy the universal criterion. Therefore, the concept of regional *jus cogens* should be abandoned and, in fact, understood as a manifestation of absolute human rights.

Making this distinction is essential for achieving the conceptual clarity of *jus cogens* in international law, while still recognising that absolute rights may exist at the regional level, shaped by the unique identity and priorities of a particular community.

²⁰³⁴ Robert Kolb, *Peremptory International Law - Jus Cogens - A General Inventory* (Oxford: Hart Publishing, 2015), 51–54, 97. Similar in Erika De Wet, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order,” *Leiden Journal of International Law* 19, no. 3 (2006): 617.

²⁰³⁵ Zdravković, “Finding the Core of International Law”, 156.

²⁰³⁶ Those were, for instance, the definition of “region”, the question of the persistent objector rule, or the situation when the state, member of a particular region, would conclude a treaty with a third state. See United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, paras. 23–47.

²⁰³⁷ Zdravković, “Finding the Core of International Law”, 157.

²⁰³⁸ United Nations, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, para. 31.

4. Normative Hierarchy in International Law - Moving Beyond Denial

At last, it is time to elucidate on the meaning of the title of this chapter and examine how absolute human rights contribute to the constitutionalisation of international law.

First of all, while it is accurate that “one is unable to find something called international constitution”,²⁰³⁹ the topic of the constitutionalisation of international law has been around for some time now. Defined as “the process of (re-)organisation and (re-)allocation of competence among the subjects of the international legal order, which shapes the international community, its value system and enforcement”,²⁰⁴⁰ it is “a catchword” for the ongoing development, formation, and identification of constitution-like features within the international legal order.²⁰⁴¹ What is more, the phenomenon of constitutionalisation has been described as “an attempt to understand, verbalise and protect the common morality and its ideals”.²⁰⁴²

So, in practical terms, constitutionalisation implies that certain international rules preform constitutionalist functions. It concerns both hierarchisation and systematisation of the international legal order.²⁰⁴³ Since both processes are connected and the hierarchisation inevitably leads to the systematisation of rules, the former merits particular attention at this place.

However, not only is there an absence of a unified framework for hierarchy within international law, but the issue has also been the subject of controversy for many years.²⁰⁴⁴

There is a particular tension around the potential hierarchisation within the human rights law. It was back in 1968, at the First World Conference on Human Rights in Tehran, when human rights were proclaimed to be “indivisible”, meaning that the fulfilment of any given human right depends on the enjoyment of other human rights.²⁰⁴⁵ The whole “indivisibility” trait is founded on the premise that only complete enjoyment of all human rights is able to truly safeguard human dignity.²⁰⁴⁶ The idea was later confirmed in the discourse, finding its place also in the 1993 Vienna Declaration and Programme of

²⁰³⁹ Jovanović, “*Jus Cogens*”, 250.

²⁰⁴⁰ Erika de Wet, “The International Constitutional Order”, *International and Comparative Law Quarterly* 55, no. 1 (2006): 51.

²⁰⁴¹ Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, *Leiden Journal of International Law* 19, no. 3 (2006): 582.

²⁰⁴² Milica V. Matijević, “Some Critical Reflections on the Broad Human Rights Constitutionalisation”, in *Constitutio Lex Superioris: Sećanja na profesora Pavla Nikolića*, edited by Oliver Nikolić and Vladimir Čolović (Belgrade: Institute for Comparative Law, 2021), 171.

²⁰⁴³ Jovanović, “*Jus Cogens*”, 252.

²⁰⁴⁴ See for instance Prosper Weil, “Vers une normativité relative en droit international?” *Revue Générale de Droit International Public* 86 (1982): 5-47; Georg Schwarzenberger, “International *Jus cogens*?” *Texas Law Review* 43 (1965): 455-478.

²⁰⁴⁵ Koji, “Emerging Hierarchy”, 918.

²⁰⁴⁶ Lanse Minkler and Shawna Sweeney, “On the Indivisibility and Interdependence of Basic Rights in Developing Countries”, *Human Rights Quarterly* 33, no. 2 (2011): 351-396.

Action.²⁰⁴⁷ So, the notion of indivisibility seems to be fundamentally at odds with any hierarchical approach in this domain.²⁰⁴⁸ It suggests that no particular human right can be placed above others and that they all share an equal standing, irrespective of whether it is believed that certain rights are more important than others.²⁰⁴⁹

Be that as it may, if this thesis has revealed anything, it is that this is not the case in reality. Through the lens of normativity, there is a clear reason why certain norms are envisaged as non-derogable,²⁰⁵⁰ at least for the majority of non-derogable rights. Undeniably, non-derogability sends an unequivocal message that any infringement on absolute human rights is unacceptable.²⁰⁵¹ Koji went so far as to claim that non-derogability trait is so significant that these rights surpass the inter-state relations in international society, reflecting the role of democracy at the international level.²⁰⁵² After all, for the matter of hierarchy, recognition of a set of “core rights” arises naturally from the fact that the extensive catalogue of human rights renders their full implementation quite difficult.²⁰⁵³

Viewed through an applied perspective, international courts and quasi-judicial bodies indeed treat rights differently, recognising certain rights as absolute and giving them priority when they conflict with other rights and considerations.

Returning to a the wider context of international law, there is no doubt that Article 53 of the VCLT accords superior hierarchical status to a particular category of rules within international law.²⁰⁵⁴ It has been rightly argued that *jus cogens* norms serve several constitutionalist functions, as they limit the law-making powers of international legislators, primarily states, and reinforce the hierarchical structure of the international legal order, by rendering any other (treaty) norm that conflicts with them null and void.²⁰⁵⁵ This is a logical consequence of the substantive content of *jus cogens* norms, and given that the legal validity of treaty law is “based on the legal consciousness of humanity”, any treaty whose provisions breach it would naturally be invalid.²⁰⁵⁶ It is said that “the international community is a community glued together by the international value system”, and *jus cogens* norms are indispensable for protecting superior values of that constitutional polity, which further accounts for their elevated status.²⁰⁵⁷

²⁰⁴⁷ UN Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, para. 5.

²⁰⁴⁸ Koji, “Emerging Hierarchy”, 918.

²⁰⁴⁹ *Ibid*, 919.

²⁰⁵⁰ Orakhelashvili, *Peremptory Norms in International Law*, 2006, 44.

²⁰⁵¹ Miodrag A. Jovanović, Ivana Krstić, “Human Rights and the Constitutionalization of International Law”, in *Human Rights in the 21st Century*, eds. Tibor Várady and Miodrag Jovanović (Eleven International Publishing and Serbian Academy of Sciences and Arts, 2020), 40.

²⁰⁵²

²⁰⁵³ Jovanović, Krstić, “Human Rights and the Constitutionalization of International Law”, 40.

²⁰⁵⁴ Jovanović, “*Jus Cogens*”, 250. Jovanović identified Article 53 as a unique case of contentless international constitutional law norm, *ibid*, 254.

²⁰⁵⁵ Jovanović, “*Jus Cogens*”, 253.

²⁰⁵⁶ Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, (Nördlingen: C. H. Beck’sche Buchhandlung, 1872), par. 410, as cited in Jovanović, “*Jus Cogens*”, 253.

²⁰⁵⁷ Jure Vidmar, “Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?” in *Hierarchy in International Law: The Place of Human Rights*, edited by Erika de Wet and Jure Vidmar (Oxford: Oxford University Press, 2012): 40.

The occurrence of hierarchy in international law was also confirmed by the ILC, which placed *jus cogens* norms above other rules on account of both their substantive content and the universal recognition of their supremacy.²⁰⁵⁸

In a word, the fact that *jus cogens* norms exist, with their rank and authority superior to all other rules of the international law,²⁰⁵⁹ is the very affirmation of the hierarchical structure of the international legal order.²⁰⁶⁰

Lastly, the remaining question is how that hierarchical structure is arranged in international legal order. By all means, the highest level is reserved for *jus cogens* norms. One may expect that they are immediately followed by *jus dispositivum*, but that is actually not the case. And this claim merits attention.

It was more than half a century ago that the ICJ introduced another category into the international legal normative system - *erga omnes* obligations. It stated that “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State [...] By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.²⁰⁶¹ Although this new concept initially brought more confusion than clarity to an already vague and unsystematised normative order, over time it has been analysed sufficiently to allow for certain conclusions to be drawn.²⁰⁶²

At this point, there is little contention that *erga omnes* obligations serve as a shield for paramount moral values,²⁰⁶³ and have even been characterised as a subcategory of international constitutional law.²⁰⁶⁴ The ICJ linked them to the fundamental and intransgressible nature of certain principles, and even referred to them as basic considerations of humanity, underscoring that *erga omnes* obligations bind all states, irrespective of whether they are parties to the treaties in which such principles are codified.²⁰⁶⁵

²⁰⁵⁸ United Nations, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006), para. 365; United Nations, International Law Commission. *Report of the International Law Commission on the Work of Its Seventy-First Session*, UN Doc. A/74/10. 2019 (2019), 142, 154-155.

²⁰⁵⁹ Antonio Cassese, *International Law* (Oxford; New York: Oxford University Press, 2005), 199.

²⁰⁶⁰ Jovanović, “*Jus Cogens*”, 254.

²⁰⁶¹ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, p. 33, para. 33.

²⁰⁶² The judgment itself had some kind of precedential value, as some scholars regarded it as further evidence of a hierarchy of international human rights, see Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 231 (Berlin – Heidelberg: Springer, 2012), 315 ff; Koji, “Emerging Hierarchy”, 931.

²⁰⁶³ Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), 310; A. J. J. de Hoogh, “The Relationship Between *Jus Cogens*, Obligations *Erga Omnes*, and International Crimes: Peremptory Norms in Perspective,” *Austrian Journal of Public International Law* 41 (1991): 192.

²⁰⁶⁴ Bardo Fassbender, “The United Nations Charter as Constitution of the International Community”, *Columbia Journal of Transnational Law* 36, no. 3 (1998): 591.

²⁰⁶⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 79.

So, if both *jus cogens* norms and *erga omnes* obligations are universally applicable norms of general international law that protect the common interests of humankind, what, then, distinguishes them?

The answer lies in the unique non-derogable nature of *jus cogens* norms.²⁰⁶⁶ *Erga omnes* obligations seek to attain the supreme normative rank of *jus cogens*, but in order to do so, they must acquire the status of non-derogable norms and receive formal recognition accordingly.²⁰⁶⁷ For this reason, it has been suggested that they should be referred to as “*jus cogens in statu nascendi*”.²⁰⁶⁸ In a three-layered structure of the international legal hierarchy, *jus cogens* norms stand at the top, followed by *erga omnes* obligations that have become norms of customary international law but have not yet attained *jus cogens* status, and, at the lowest tier, all other dispositive norms of international law.²⁰⁶⁹

Finally, what is the relationship between *erga omnes* obligations and absolute human rights? Well, it is not straightforward. Absolute human rights that emerge exclusively within a single human rights regime do not have an *erga omnes* character, as they are not binding on all states, that is to say, on the states that are not parties to the relevant treaty. By contrast, those right that are considered absolute under all of the human rights regimes automatically satisfy the requirements for peremptory status, hence, they do have an *erga omnes* scope of application but are not considered *erga omnes* obligations in this sense.

Therefore, it can be concluded that absolute human rights introduce a hierarchical dimension into international human rights law, as they constitute supreme norms that invariably prevail over other conflicting rights, thereby unconditionally protecting the most fundamental interests. Consequently, they occupy the highest rank among human rights.

The category of absolute human rights most clearly demonstrates the existence of normative hierarchy within human rights, contributing significantly to the constitutional framework of international legal order.

And at the broader level of international law, however, their precise position depends on the particular right in question, specifically, on whether the right has attained *jus cogens* status or not. Ultimately, the interplay between absolute human rights and *jus cogens* norms remains a decisive factor in shaping the evolving architecture of the international legal system.

²⁰⁶⁶ Ana Zdravković, “Obligations *Erga Omnes* – *Jus Cogens in Statu Nascendi*? A Theory Inspired by the Nature of International Law,” *Union University Law School Review* 12, no. 2 (2021): 588.

²⁰⁶⁷ *Ibid.*

²⁰⁶⁸ *Ibid.*

²⁰⁶⁹ *Ibid.* For the layered nature see also De Wet, “The International Constitutional Order”, 62.

CONCLUSION: ABSOLUTE HUMAN RIGHTS ON THE BRIDGE BETWEEN PHILOSOPHY AND LAW

The aim of this thesis was to conceptualise what absolute human rights are, which was done by embarking on the topic of human rights restrictions and conducting a comprehensive analysis of the relevant theoretical approaches and the case-law of international monitoring bodies. The inquiry moved deliberately between philosophy and doctrine, acknowledging the ways in which moral arguments may have shaped the legal vocabulary of absoluteness.

Across the pages, several claims emerged. Firstly, for a notion so often described as non-existent, it continues to spark wide and intense debates that still torment so many scholars, which may be regarded as a demonstration of its both legal and philosophical importance. Moreover, the language of absolutes remains present in international human rights adjudication, even though courts rarely pause to unpack it. Additionally, a disciplined, non-overlapping taxonomy of human rights restrictions is indispensable for the better understanding and safeguarding of human rights in international law, and also useful for advancing doctrinal reasoning. And finally, absolute rights should be understood as categorical prohibitions, immune to the machinery of human rights restrictions and proportionality balancing, thereby being infeasible in their nature. Understood in this way, absolute human rights are at the apex of the internal hierarchy of human rights. Although they may vary across different human rights systems, these rights are the category closest to *jus cogens* norms, as they effectively determine which rights are going to attain peremptory status, given that rights that have achieved absolute protection in all regions are obviously recognised as *jus cogens*.

So, the first chapter of the thesis revisited the philosophical debates about absolutes that have been entertaining scholars for decades. The point was not to crown a single theory but to map the arguments that continue to surface in the literature, such as deontological refusal of any kind of trade-offs and consequentialist anxieties regarding the ticking bombs, as well as hybrid positions that dilute the very idea of exceptionlessness. In addition, the post-9/11 paranoia confirmed a basic lesson of the state of emergency – the most important norms must be able to withstand the moments when they are least convenient. And the same could be said for the recent COVID-19 pandemic, which reaffirmed states' urge to abuse human rights when they are not monitored properly.²⁰⁷⁰ All of these insights guided the rest of the thesis.

The following part detected not only that there is a confusion in the scholarship regarding the notions connected to the human rights restrictions, but also that even international treaties fell into the trap of terminological inconsistency. Therefore, it offered the systematisation of human rights restrictions, suggesting that the term "restrictions" should be used as a general notion, encompassing four different types of restrictions. Firstly, there are derogations, as temporary, emergency-specific suspensions of human rights, followed by limitations, as ordinary-time curtailments tied to textually stated legitimate aims and tested by proportionality, then implicit limitations, as judge-made constraints that operate like limitations in practice, except that no legitimate aims are specified in advance, a feature that risks undermining legal certainty, and finally, pinpoint exceptions, as tightly enumerated carve-outs built into the definition of the right in the norm itself. The

²⁰⁷⁰ For more see Zdravković, "The Affair of "State of Emergency", 1-12.

conceptualisation of this last type was especially challenging, as it is rarely discussed in the literature as a distinct category. Nevertheless, the thesis deemed it necessary to separate it from other types of restrictions, given its own specific traits, and to assign it a dedicated term, namely, pinpoint exceptions.

The benefits of this systematisation are not merely terminological, as they also have the potential to bring structure in both doctrine and jurisprudence and sharpen the way courts reason about them. The chapter tackled many relevant issues regarding each type of restrictions. It considered, for instance, whether derogations are the appropriate mechanism for responding to the emergency states, comparing them with alternative approaches such as denunciation, state of necessity and *lex specialis*, only to conclude that at the present state of international right law, derogation remains the most viable option. The chapter also examined the conditions for a lawful derogation, highlighting contentious issues, such as whether a failure to provide proper notification invalidates the derogation, and urging corrective measures in this regard, both in terms of further clarification by monitoring bodies and more consistent implementation by states. Particular attention in the chapter was dedicated to the institute of non-derogability, as it is of paramount importance for the topic of the thesis, examining the underlying ideas behind non-derogable rights and indicating that non-derogation clauses may have even entered the realm of international customary law.

The third chapter walked the treaty landscape, with particular attention dedicated to those treaties that contain a derogation clause, which are the ECHR, ICCPR, ACHR, and their jurisprudence. The comparative examination demonstrated that on the one hand, courts and quasi-judicial bodies regularly use the rhetoric of absoluteness, but on the other hand, judgements often lean on its intuitive meaning rather than clearly reveal what it conceptually means or what the practical implications of such a trait are. Research results have shown that the authority of absolute rights rests more on declaratory statements than on well-reasoned jurisprudence, although a thorough analysis revealed the difference in approaching absolute compared to relative rights. While the pioneering role in this field does indeed belong to the ECtHR, with the HRC frequently adopting similar positions, the ACtHR advanced the concept further by often declaring certain rights to be both absolute and *jus cogens* norms. It was uncovered that this development, together with the fact that the ACHR contains the longest list of non-derogable rights among the three examined treaties, can be attributed to specific historical circumstances of the region at hand. Moreover, the chapter also traced instances where certain rights are treated in practice as unconditional without explicitly naming them absolute. All of these discrepancies, which can shortly be described as “strong language, weak theory”, were a key motivation for the conceptual analysis that followed.

So, the central chapter offered the definition that anchors this thesis, stating that an absolute human right is a right that protects against certain acts through categorical prohibitions and cannot be subjected to human rights restrictions, as it is non-derogable, contains neither limitation clauses nor implicit limitations, admits no pinpoint exceptions, is insulated from proportionality analysis, and is infeasible where its scope applies. They are necessarily negative injunctions because only in that form does the precise wording of absolute rights offer unambiguous direction regarding the actions that must be avoided. Such clarity cannot be found in the formulations of other (relative) human rights and freedoms. Additionally, from the chapter it is apparent that the heightened importance of absolute human rights derives from the recognition in both legal theory and practice that they afford the strongest protection to human dignity. The whole account is, therefore, built by relying on the views of courts and scholarship, with certain corrections that are aimed at

providing a robust and comprehensive framework, which is required for a conceptual endeavour of this kind. In other words, it is a theoretical creation formed on relevant empirical insights.

As in any other doctrinal analysis, the result strives to have implications that would facilitate a more consistent application of the concept in practice, at least by offering a mechanism for identification of absolute human rights, which consists of examining not only whether it protects a value of significant importance for the particular community but also whether it survives each restriction gateway and excludes proportionality at the point of its application. Therefore, the list of absolute rights that are recognised across all of the examined treaties and identified in this thesis contains the prohibition on arbitrary deprivation of life (including the absolute prohibition on forced disappearances), the prohibition of torture, (cruel,) inhuman or degrading treatment or punishment, including the prohibition of *refoulement*, the prohibition of slavery and servitude and the prohibition of *ex post facto* laws. The prohibition of death penalty is also absolute, but only within the ECHR system, while the ICCPR contains additional absolute prohibitions of any interference with one's thought, conscience and religion and coercion which would impair the freedom to have or to adopt a religion or belief of one's choice. For the ACHR, those are the absolute prohibition of any interference with one's conscience and religion and the prohibition of restrictions that might impair one's freedom to maintain or to change his religion or beliefs. Finally, the ICCPR and the ACHR share one other absolute right, embedded in the prohibition of denying recognition as a person before the law.

The final part of the thesis analysed the place for absolute rights within the normative hierarchy of international law, addressing controversial debates regarding the constitutionalisation of international legal order. The thesis emphasised the importance of not conflating them with peremptory norms, noting that while some of absolute rights are also *jus cogens*, others are only supreme within the human rights subsystem.

Still, the category of absolute rights goes a step further compared to the *jus cogens*, since it indicates how this supremacy is operationalised within human rights adjudication. Namely, by closing the usual escape hatches in the form of derogation, limitation, implicit limitation, pinpoint exception, or in a word, proportionality analysis, absolute human rights are shown to have particular consequences, at least with regard to the manner of reasoning and judicial adjudication. In that sense, absolute rights both reflect and reinforce the constitutionalising tendencies of international law, since they set bright lines that structure institutional behaviour when the pressure to bend those lines is the greatest.

On the other hand, *jus cogens* norms were traditionally criticised for the very fact that they so far had rare or even no implications in practice. In the jurisprudence of international courts, they were typically cited merely to enhance the moral force of certain arguments, giving them a largely declaratory character, instead of being applied to invalidate immoral treaties or to solve situations involving conflicts of norms.²⁰⁷¹ Put simply, they have almost never been *ratio decidendi* of judgements of the international judicial bodies.²⁰⁷² Although this cannot be said entirely for absolute rights, since, as already demonstrated, they have thus far made a broader influence on judicial practice and reasoning, there nonetheless remains room for improvement in their treatment. Greater clarity and structure in the

²⁰⁷¹ Erika De Wet, "Entrenching international values through positive law: The (limited) effect of peremptory norms", *KFG Working Paper Series* 25 (2019): 16-17.

²⁰⁷² Antonio Cassese, "For an Enhanced Role of Jus Cogens," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 159.

judicial approach would enhance legal certainty and strengthen the protection of rights, which, after all, should remain the objective of both the doctrine and adjudication.

One other conclusion from this part of the analysis unfolding in the thesis concerns the idea of regional *jus cogens* norms, a concept that was ultimately rejected by this study, because a norm limited to one region, no matter how important it is, fails to meet the requirement of universality, hence cannot be considered a *jus cogens* norm. Thus, the only way to perceive the notion of regional *jus cogens* is as an expression of absolute human rights.

Finally, the chapter also tackled the notion of *erga omnes* obligations, which are, like *jus cogens* norms, universally binding and protect fundamental values, but do not possess non-derogable character. Therefore, it is suggested that they should be considered “*jus cogens in statu nascendi*” and that within the international legal hierarchy, their position is between peremptory norms, which occupy the top tier, and *jus dispositivum*, which is at the very bottom of the ladder. The thesis took a stance that virtually there is no link between *erga omnes* obligations and absolute rights, for the fact that when rights are absolute only within a particular human rights regime, they lack *erga omnes* effect, whereas when they are deemed absolute across all human rights systems, they have already met the requirements for the peremptory status.

There are, inevitably, limits to this thesis, with many questions left unaddressed. For instance, although it seems that absolute human rights should not be subject to reservation, as that would be contrary to the object and purpose of human rights treaties,²⁰⁷³ this claim deserves further analysis that cannot be offered at this place. What is more, all three examined treaties contain “restriction clauses”,²⁰⁷⁴ that may have some relevance to the topics analysed by this thesis, hence they merit deeper examination, which lies beyond the scope of this work. In addition, it remains to be seen whether courts will apply circumstances precluding wrongfulness to cases involving state responsibility for breaches of absolute human rights that have not yet attained *jus cogens* status, since these are the only norms for which such application is explicitly excluded.²⁰⁷⁵ These topics, along with many others, will likely be subject to some future analysis and ongoing reconsiderations, which are necessary for strengthening any theoretical account.

Looking ahead, one conclusion is certain. Even if the account proposed by this thesis is not widely accepted, adjudicating bodies should be urged to forsake their ambivalent approach and head towards a more structural one. Admittedly, this is not an easy task. Treaty texts differ, lists of non-derogable rights are not the same, hence regional practice evolves unevenly. Some rights appear to be absolute in moral arguments, yet, they remain embedded in limitation clauses, while others have moved toward *de facto* absoluteness through case law without express doctrinal articulation.

Nevertheless, it is unacceptable for the ECtHR to state that the right is absolute and afterwards use phrases such as “in the absence of convincing security needs”.²⁰⁷⁶ Although it was shown that such considerations are sometimes necessary when deliberating on the scope of the right, as part of what this thesis coined as “contextual interpretative

²⁰⁷³ A rule set out in Article 19 of the VCLT.

²⁰⁷⁴ See Article 18 of the ECHR, Article 5 of the ICCPR and Article 30 of the ACHR.

²⁰⁷⁵ See Article 26 of the ARSIWA. See also Trapp, “Exemptions, Qualifications, Derogations, and Excuses”, 305.

²⁰⁷⁶ ECtHR, *Van Der Ven v. Netherlands*, para. 62.

qualification”, the Court’s approach must be wiser in the sense of structure and systematised argumentation. Judges shall not proclaim a right as absolute only to manage it as though it is not.

Where a right truly functions as an absolute, adjudicators should say so and apply the implications of absoluteness consistently, without leaving room for restrictions and proportionality and without defeating the right. On the other hand, where a right demands balancing, courts should resist absolute rhetoric and admit to undertaking proportionality analysis openly. Finally, where a right is moving toward absolute status, decision-makers should articulate the reasons for choosing a particular approach, rather than smuggling it shut.

In that sense, the thesis aims at contributing to the general human rights discourse in several ways. By offering a systematic classification of human rights restrictions, it created a tool for assessing human rights enjoyment with a considerable reduction in the terminological confusion and interpretive slippage that currently exist across human rights systems. Consequently, by conceptualising a legal, not merely rhetorical or, in Addo and Grief’s words, “skeletal” definition,²⁰⁷⁷ it aims to advance the absoluteness from an evocative adjective to a useful framework that is capable of guiding structural reasoning with predictive implications. The expected product is, of course, a reasoned list of rights that are absolute under the proposed definition, together with an explanation of why certain rights, which have sometimes been asserted as absolute, do not qualify for the status. A possible added value of this analysis is in a principled account of hierarchy within international human rights law that has strived to end the tension surrounding this topic for decades, followed by the clear differentiation between absolute human rights, *jus cogens* norms and *erga omnes* obligations.

Ultimately, the thesis aspires to position itself somewhere on the bridge between philosophy and law, by employing certain methods from the philosophy of law and giving due consideration to hypothetical hard cases from moral philosophy, while at the same time insisting that legal systems cannot be designed solely around “catastrophic” what-ifs, but primarily by recognising certain values that should be unconditionally protected and building upon the existing empirical legal framework. From that perspective, absolute categories in law are justified not only by moral intuitions, which arguably differ depending on the accepted ethical theory, but by their pivotal role in safeguarding human dignity under all circumstances, which is said to be the ultimate aim of the human rights law. However, it is also true that the real power of the legal rule depends on whether people actually believe in it and whether it embodies their shared sense of right and wrong. Consequently, it is conceivable that rights identified in this thesis as absolute may one day cease to hold that status. Yet, the framework presented here is general in nature and therefore leaves room for such an (unfavourable) outcome.

Even if the proposed definition of absolute human rights is ultimately rejected, the thesis aims to sharpen the discourse so that future uses of “absolute” are clearer, narrower, and more defensible. By making the meaning and consequences of the label explicit, it becomes possible to apply it consistently rather than as an ornament.

If only a single conclusion were to be drawn, it would be that clarity is a form of protection. By naming the tools of restriction precisely and reserving the label “absolute” for rights that are actually immune to those restrictions, courts are given the opportunity to

²⁰⁷⁷ Addo and Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?,” 516.

reason more coherently, with outcomes of their decisions being more predictable and the system's promises more credible. And that is not a final philosophical answer, it is a legal architecture that is strong enough to hold disagreements, but still protect fundamental rights, precisely the kind of architecture human rights law was built to provide.

Finally, the timing of this thesis is not insignificant, especially in light of the growing uncertainties facing the contemporary international community, which is still struggling to recover from the pandemic while simultaneously confronted with various armed conflicts, autocratic regimes, and democratic backsliding in developed countries. Periods of such instability are especially prone to privileging national security and other particular interests at the expense of core values. Yet, if absolute rights mean anything, then their relevance is constant, because otherwise, they would not exist, nor could they fulfil their purpose. And still, it somehow seems that their affirmation is now more urgent than ever.

BIBLIOGRAPHY

Monographs

- Alexy, Robert. *Law's Ideal Dimension*. Oxford: Oxford University Press, 2021.
- Alexy, Robert. *Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002.
- Barak, Aharon. *Proportionality: Constitutional Rights and Their Limitation*. Cambridge: Cambridge University Press, 2012.
- Barak, Aharon. *The Judge in a Democracy*. Princeton: Princeton University Press, 2006.
- Beitz, Charles. *The Idea of Human Rights*. Oxford: Oxford University Press, 2011.
- Blackstone, Sir William. *Commentaries on the Laws of England in Four Books*. Vol. 1 – Books I & II. Philadelphia: J.B. Lippincott Co., 1893. Chapter I: Of the Absolute Rights of Individuals. Available online via Liberty Fund, Inc. <https://oll.libertyfund.org/page/blackstone-on-the-absolute-rights-of-individuals-1753>. (accessed 12 December 2023).
- Bluntschli, Johann Caspar. *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*. Nördlingen: C. H. Beck'sche Buchhandlung, 1872, as cited in Jovanović, "Jus Cogens," 253.
- Bossuyt, Marc. *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*. Dordrecht: Martinus Nijhoff, 1987.
- Bretscher, Fabienne. *Protecting the Religious Freedom of New Minorities in International Law*. Abingdon: Routledge, 2020.
- Buchanan, Allen. *The Heart of Human Rights*. Oxford: Oxford University Press, 2013.
- Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003.
- Cassese, Antonio. *International Law*. Oxford; New York: Oxford University Press, 2005.
- Craven, Matthew C. R. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*. Oxford: Clarendon Press, 1995.
- Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002.
- Gross, Oren, and Fionnuala Ní Aoláin. *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press, 2006.
- De Schutter, Olivier. *International Human Rights Law*. Cambridge: Cambridge University Press, 2014.
- Dembour, Marie-Bénédicte. *Who Believes in Human Rights?: Reflections on the European Convention*. Cambridge: Cambridge University Press, 2006.
- Dershowitz, Alan M. *Why Terrorism Works – Understanding the Threat Responding to the Challenge*. New Haven and London: Yale University Press, 2002.
- Dimitrijević, Vojin, Dragoljub Popović, Tatjana Papić, and Vesna Petrović. *Međunarodno pravo ljudskih prava*. Beograd: Beogradski centar za ljudska prava, 2007.
- Donnelly, Jack. *International Human Rights*. Boulder, CO: Westview Press, 1998.

- Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge: Cambridge University Press, 2006.
- Emmerson, Ben QC, Andrew John Ashworth QC (Hon), and Alison Macdonald, eds. *Human Rights and Criminal Justice*. London: Sweet & Maxwell, 2007.
- Encyclopaedia Britannica. *A Dictionary of Arts, Sciences, Literature and Other Information*. 11th ed. Vol. 27. New York: Cambridge University Press, n.d.
- Evans, Malcolm D. *Religious Liberty and International Law in Europe*. Cambridge: Cambridge University Press, 1997.
- Evans, Malcolm, and Rod Morgan. *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Oxford: Clarendon Press, 1998.
- Farrell, Michelle. *The Prohibition of Torture in Exceptional Circumstances*. Cambridge: Cambridge University Press, 2013.
- Fawcett, Sir James Edmund Sandford. *The Application of the European Convention on Human Rights*. Oxford: Oxford University Press, 1969.
- Feinberg, Joel. *Social Philosophy*. Englewood Cliffs, NJ: Prentice-Hall, 1973.
- Fellmeth, Aaron X., and Maurice Horwitz. *Guide to Latin in International Law*. Oxford: Oxford University Press, 2009.
- Finnis, John. *Aquinas: Moral, Political, and Legal Theory*. Oxford: Oxford University Press, 1998.
- Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.
- Fitzmaurice, Gerald. *The General Principles of International Law Considered from the Standpoint of the Rule of Law*. *Collected Courses of the Hague Academy of International Law*, vol. 92. Leiden: A. W. Sijthoff, 1958.
- Foot, Philippa. *Virtues and Vices and Other Essays in Moral Philosophy*. Oxford: Basil Blackwell, 1978.
- Foster, Steve. *Human Rights and Civil Liberties*. Harlow: Pearson Education, 2011.
- Gewirth, Alan. *Human Rights: Essays on Justification and Applications*. Chicago: University of Chicago Press, 1982.
- Greer, Steven. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge: Cambridge University Press, 2006.
- Greer, Steven. *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 1997.
- Griffin, James. *On Human Rights*. Oxford: Oxford University Press, 2008.
- Harris, David John, Michael O'Boyle, and Carla Warbrick. *Law of the European Convention on Human Rights*. London: Butterworths, 1995.
- Harris, David John, Michael O'Boyle, Edward P. Bates, and Carla M. Buckley. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, 2018.
- Hart, Herbert L. A. *The Concept of Law*. Oxford: Oxford University Press, 1961.
- Henckaerts, Jean-Marie, and Louise Doswald-Beck. *Customary International Humanitarian Law. Volume I: Rules*. Cambridge: Cambridge University Press, 2005.

- Hennebel, Ludovic, and Hélène Tigroudja. *The American Convention on Human Rights – A Commentary*. New York: Oxford University Press, 2022.
- Higgins, Rosalyn. *Themes and Theories*. Oxford: Oxford University Press, 2009.
- Jacobs, Francis G. *The European Convention on Human Rights*. Oxford: Clarendon Press, 1975, as cited in Rosalyn Higgins, *Themes and Theories*, 463.
- Joseph, Sarah, and Melissa Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. New York: Oxford University Press, 2013.
- Klatt, Matthias, and Moritz Meister. *The Constitutional Structure of Proportionality*. Oxford: Oxford University Press, 2012.
- Kleinlein, Thomas. *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 231. Berlin – Heidelberg: Springer, 2012.
- Kolb, Robert. *Peremptory International Law – Jus Cogens – A General Inventory*. Oxford: Hart Publishing, 2015.
- Krstić, Ivana. *Univerzalna nadležnost u međunarodnom pravu za teške povrede ljudskih prava*. Beograd: Pravni fakultet Univerziteta u Beogradu, 2013.
- Langbein, John. *Torture and the Law of Proof*. Chicago: University of Chicago Press, 1977.
- Lauterpacht, Hersch. *International Law and Human Rights*. London: Stevens & Sons, 1950.
- Lawson, Rick. *Het EVRM en de Europese Gemeenschappen*. Deventer: Kluwer, 1999, as cited in Hemme Battjes, “In Search of a Fair Balance,” 590.
- Leach, Philip. *Taking a Case to the European Court of Human Rights*. 1st ed. London: Blackstone, 2001.
- Marinković, Tanasije, and Ivana Krstić. *Evropsko pravo ljudskih prava*. Beograd: Savet Evrope, 2016.
- Matthews, Richard. *The Absolute Violation – Why Torture Must Be Prohibited*. Montreal & Kingston: McGill-Queen’s University Press, 2008.
- Mavronicola, Natasa. *Torture, Inhumanity and Degradation under Article 3 of the ECHR – Absolute Rights and Absolute Wrong*. Oxford: Hart Publishing, 2021.
- McCoy, Alfred W. *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*. New York: Metropolitan Books, 2006.
- Milan Paunović, Boris Krivokapić, and Ivana Krstić. *Međunarodno pravo ljudskih prava*. Beograd: Pravni fakultet Univerziteta u Beogradu, 2014.
- Möller, Kai. *The Global Model of Constitutional Rights*. Oxford: Oxford University Press, 2012.
- Morsink, Johannes. *Article by Article: The Universal Declaration of Human Rights for a New Generation*. Philadelphia: University of Pennsylvania Press, 2022.
- Mowbray, Alastair. *Cases, Materials and Commentary on the European Convention on Human Rights*. Oxford: Oxford University Press, 2007.
- Nagel, Thomas. *Mortal Questions*. Cambridge: Cambridge University Press, 1979.
- Nowak, Manfred. *UN Covenant on Civil and Political Rights – CCPR Commentary*. Kehl am Rhein: N. P. Engel, 2005.
- Nozick, Robert. *Anarchy, State, and Utopia*. Oxford: Blackwell Publishers Ltd, 1974.

- O'Connell, Daniel Patrick. *International Law*. London: Stevens, 1965.
- Oppenheim, Lassa. *International Law: A Thesis*. 7th ed. Vol. 1. London: Longmans, Green, 1948.
- Oraá, Juan. *Human Rights in States of Emergency in International Law*. Oxford: Oxford University Press, 1992.
- Orakhelashvili, Alexander. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2006.
- Ouguerouz, Fatsah. *The African Charter of Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. The Hague: Martinus Nijhoff Publishers, 2003.
- Ovey, Clare, and Robin White. *Jacobs and White: European Convention on Human Rights*. Oxford: Oxford University Press, 2002.
- Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge: Cambridge University Press, 2013.
- Perry, Michael J. *The Idea of Human Rights: Four Inquiries*. New York: Oxford University Press, 1998.
- Peters, Edward. *Torture*. Philadelphia: University of Pennsylvania Press, 1996.
- Popović, Dragoljub, Violeta Beširević, Slavoljub Carić, and Marija Draškić et al. *Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda*. Beograd: Službeni glasnik, 2017.
- Robertson, Martin, and Amnesty International. *Torture in the Eighties: An Amnesty International Report*. London: Amnesty International Publications, 1984.
- Schauer, Frederick. *Playing by the Rules*. Oxford: Clarendon Press, 1991.
- Scheffler, Samuel. *The Rejection of Consequentialism – A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions*. Oxford: Oxford University Press, 2003.
- Sepúlveda Carmona, Magdalena. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*. Antwerp: Intersentia, 2003.
- Shue, Henry. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton: Princeton University Press, 1980.
- Spaić, Bojan. *Priroda i determinante sudijskog tumačenja prava*. Beograd: Pravni fakultet Univerziteta u Beogradu, 2020.
- Steiner, Henry J., Philip Alston, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press, 2008.
- Stratis, Calogeropoulos Aristidis S. *Droit humanitaire et droits de l'homme*. Geneva: Institut universitaire de hautes études internationales and A.W. Sijthoff/Kluwer Academic Publishers, 1980.
- Tams, Christian J. *Enforcing Obligations Erga Omnes in International Law*. Cambridge: Cambridge University Press, 2005.
- Taylor, Paul M. *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*. Cambridge: Cambridge University Press, 2020.
- Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge: Harvard University Press, 1990.

- Van Drooghenbroeck, Sébastien. *La proportionnalité dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux*. Brussels: Presses universitaires Saint-Louis, 2001, as cited in Marie-Bénédicte Dembour, *Who Believes in Human Rights?*, 82–83.
- Viljoen, Frans. *International Human Rights Law in Africa*. Oxford: Oxford University Press, 2012.
- Waldron, Jeremy. *Torture, Terror, and Trade-Offs: Philosophy for the White House*. Oxford: Oxford University Press, 2010.
- Weatherall, Thomas. *Jus Cogens – International Law and Social Contract*. Cambridge: Cambridge University Press, 2015.
- Webster, Elaine. *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights*. 1st ed. New York: Routledge, 2018.
- Wicks, Elizabeth. *The Right to Life and Conflicting Interests*. Oxford: Oxford University Press, 2010.

Journal Articles and Books Chapters

- Adams, Robert Merrihew. "Religious Ethics in a Pluralistic Society." In *Prospects for a Common Morality*, edited by Gene Outka and John P. Reeder, Jr., 93-113. Princeton: Princeton University Press, 1993.
- Addo, Michael K., and Nicholas Grief. "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?" *European Journal of International Law* 9 (1998): 510-524.
- Allain, Jean. "Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law." *European Convention on Human Rights Law Review* 11 (2005): 480-498.
- Allhoff, Fritz. "A Defence of Torture: Separation of Cases, Ticking Time-bombs, and Moral Justification". *International Journal of Applied Philosophy* 19, No. 2 (2005): 243-264
- Allison, Lincoln. "The Utilitarian Ethics of Punishment and Torture" in *The Utilitarian Response: Essays on the Contemporary Viability of Utilitarian Political Philosophy*, edited by Lincoln Allison, 9-29. London: Sage Publications, 1990.
- Arai-Yokoi, Yutaka. "Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR." *Netherlands Quarterly of Human Rights* 21, no. 3 (2003): 385-421.
- Åström, Karin. "The Freedom of Religion in Relation to Other Human Rights." In *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, edited by Hedvig Bernitz and Victoria Enkvist, 75-98. Oxford: Hart Publishing, 2020.
- Bassiouni, M. Cherif. "Great Nations and Torture", in *The Torture Debate in America*, edited by Karen J. Greenberg, 256-260. Cambridge: Cambridge University Press, 2005
- Bates, Ed. "A 'Public Emergency Threatening the Life of the Nation'? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December and the 'A' Case." *British Yearbook of International Law* 76 (2006): 245-292.
- Battjes, Hemme. "In Search of a Fair Balance." In *Europees Migratierecht*, 587-613. Deventer: Kluwer, 2017, as cited in Rick Lawson, *Het EVRM en de Europese Gemeenschappen*, 590.
- Battjes, Hemme. "In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed." *Leiden Journal of International Law* 22 (2009): 583-621.
- Becket, James. "The Greek Case Before the European Human Rights Commission." *Human Rights* (American Bar Association) (1970): 91-117.
- Bedau, Hugo. "The Right to Life." *The Monist* (1968): 550-575.
- Bernhard, Schlink. "Proportionality." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 718-737. Oxford: Oxford University Press, 2012.
- Besson, Samantha. "International Human Rights Law and Mirrors". *ESIL Reflections* 7, No. 2. (2018).

- Bielefeldt, Heiner. "Freedom of Religion or Belief – A Human Right under Pressure." *Oxford Journal of Law and Religion* 1, no. 1 (2012): 1-21.
- Bourgon, Stephane. "The Impact of Terrorism on the Principle of 'Non-Refoulement' of Refugees: The Suresh Case before the Supreme Court of Canada". *Journal of International Criminal Justice* 1 (2003): 169-185.
- Boyle, Kevin, and Sangeeta Shah. "Thought, Expression, Association, and Assembly." In *International Human Rights Law*, 2nd ed., edited by Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, 217-237. Oxford: Oxford University Press, 2014.
- Brożek, Bartosz. "Law and Defeasibility." *Revus* 23 (2014): 165-170.
- Buerghenthal, Thomas. "The American and European Conventions on Human Rights: Similarities and Differences." *American University Law Review* 30 (1981): 155-166.
- Çalı, Başak. "International Legal Human Rights and Moral Human Rights -Friends or a Foes?" in *Human Rights in the 21st Century*, edited by Miodrag Jovanovic and Ana Zdravkovic, 13-25. Eleven International Publishing and the Serbian Academy of Sciences and Arts, 2020.
- Cassese, Antonio. "For an Enhanced Role of Jus Cogens." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 158-171. Oxford: Oxford University Press, 2012.
- Cataldi, Giuseppe. "Introduction to the Universal Declaration of Human Rights." *Europa Ethnica* 76, no. 3-4 (2019): 102-108.
- Chesney, Robert M. "Boumediene v. Bush", *The American Journal of International Law* 102, No. 4 (2008): 848-854.
- Chinkin, Clare C. "Women's Human Rights and Religion: How Do They Co-Exist?" In *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, edited by Hedvig Bernitz and Victoria Enkvist, 30-50. Oxford: Hart Publishing, 2020.
- Coffey, Ger. "An Interpretative Analysis of the European *ne bis in idem* Principle Through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?" *New Journal of European Criminal Law* 14, no. 3 (2023): 345-373.
- Cowell, Frederick. "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR." *Birkbeck Law Review* 1 (2013): 135-153.
- Criddle, Evan J. "Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference." In *Human Rights in Emergencies*, 1st ed., edited by Evan J. Criddle, 32-55. Cambridge: Cambridge University Press, 2016.
- Criddle, Evan J. and Evan Fox-Decent. "Human Rights, Emergencies, and the Rule of Law." *Human Rights Quarterly* 34 (2012): 39-87.
- Čučković, Bojana. "Uticaj Istanbulske konvencije na standarde Evropskog suda za ljudska prava – pozitivna obaveza zaštite žrtava kao element osnovnih ljudskih prava." In *Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici - Deset godina primene*, edited by Ivana Krstić, 49-77. Beograd: Pravni fakultet Univerziteta u Beogradu, 2024.

- D'Sa, R. "Human and People's Rights: Distinctive Features of the African Charter." *Journal of African Law* 29, no. 2 (1985): 72–81.
- Dajović, Goran. "Pravna nauka i konceptualna analiza." In *Challenges and Perspectives of the Development of Legal Systems in 21st Century*, eds. Igor Milinković and Bojan Vlaški, 63–95. Banja Luka: Faculty of Law, University of Banja Luka, 2022.
- Danchin, Peter G. "Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law." *Harvard International Law Journal* 49, no. 2 (2008): 249–322.
- de Hoogh, A. J. J. "The Relationship Between *Jus Cogens*, Obligations *Erga Omnes*, and International Crimes: Peremptory Norms in Perspective." *Austrian Journal of Public International Law* 41 (1991): 190–210.
- De Wet, Erika. "Entrenching International Values through Positive Law: The (Limited) Effect of Peremptory Norms." *KFG Working Paper Series* 25 (2019): 3–19.
- De Wet, Erika. "Jus Cogens and Obligations *Erga Omnes*." In *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton, 541–556. Oxford: Oxford University Press, 2013.
- De Wet, Erika. "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19, no. 3 (2006): 611–632.
- De Wet, Erika. "The International Constitutional Order." *International and Comparative Law Quarterly* 55, no. 1 (2006): 51–76.
- Dershowitz, Alan M. "Torture Reasoning" in *Torture: A Collection*, edited by Sanford Levinson, 257–290. Oxford: Oxford University Press, 2004.
- Dolcetti, Andrea, and Giovanni Battista Ratti. "Derogation and Defeasibility in International Law." In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, 108–124. Oxford: Oxford University Press, 2020.
- Dolcetti, Andrea, and Giovanni Battista Ratti. "La Derrotabilidad Jurídica como Relación Sistemática Compleja." *Analisi e Diritto* 2016 (2016): 35–44.
- Donnelly, Jack. "Human Rights as Natural Rights". *Human Rights Quarterly* 4 (1982): 391–405.
- Drake, Richard. "The Aldo Moro Murder Case in Retrospect". *Journal of Cold War Studies* 8, No. 2 (2006): 114–125.
- Duarte, David. "Alexy, Robert: On Rules and Principles." In *Encyclopedia of the Philosophy of Law and Social Philosophy*, edited by Mortimer Sellers and Stephan Kirste, 41–45. Cham: Springer, 2023.
- Đukić, Dalibor. "Vera, zdravlje, pravo: ograničenja slobode veroispovesti u uslovima pandemije." *Harmonius: Journal of Legal and Social Studies in Southeast Europe*, no. 10 (2021): 76–95.
- El-Rashed, Deena Mohammad. "Derogation in Time of Emergency: An Analysis of Counter-Terrorism Measures in France and Their Impact on Human Rights." *Florida Journal of International Law* 30, no. 1 (2018): 1–26.
- Elshtain, Jean Bethke. "Reflection on the Problem of 'Dirty Hands'" in *Torture: A Collection*, edited by Sanford Levinson, 77–89. Oxford: Oxford University Press, 2004.

- Evans, Malcolm D. "The Relationship of Religion and Human Rights." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 563-581. New York: Routledge, 2013.
- Fassbender, Bardo. "The United Nations Charter as Constitution of the International Community." *Columbia Journal of Transnational Law* 36, no. 3 (1998): 529-619.
- Felner, Eitan. "Torture and Terrorism: Painful Lessons Learned from Israel" in *Torture: Does It Make Us Safer? Is It Ever Ok? A Human Rights Perspective*, edited by Kenneth Roth, Minky Worden and Amy Bernstein, 28-43. The New Press, 2005.
- Feteris, Eveline T. "Prototypical Argumentative Patterns in a Legal Context: The Role of Pragmatic Argumentation in the Justification of Judicial Decisions." *Argumentation* 30 (2016): 61-79.
- Finnis, John. "Absolute Rights: Some Problems Illustrated", *The American Journal of Jurisprudence* 61, No. 2 (2016): 195-215.
- Flinterman, Cees. "Derogations from the Rights and Freedoms in Case of a Public Emergency (Article 15)." In *Theory and Practice of the European Convention on Human Rights*, edited by Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak, 1053-1075. Antwerp: Intersentia, 2006.
- Foot, Philippa. "The Problem of Abortion and the Doctrine of Double Effect". *Oxford Review*, No. 5 (1967): 5-15.
- Fox, Elizabeth. "A Prosecution in Trouble". *Atlantic Monthly* 3 (1985), as cited in Dershowitz, Alan M. *Why Terrorism Works - Understanding the Threat Responding to the Challenge*. New Haven and London: Yale University Press, 2002.
- Freeman, Michael. "Universalism of Human Rights and Cultural Relativism." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 49-63. London: Routledge, 2013.
- Garibaldi, Oscar M. "The Limitation and Derogation Clauses." In *U.S. Ratification of the International Covenants on Human Rights*, edited by Hurst Hannum and Dana D. Fischer, 128-148. New York: Transnational Publishers; Leiden: Brill Nijhoff, 1993.
- Gewirth, Alan. "Are There Any Absolute Rights?". *The Philosophical Quarterly* 31, No. 122 (1981): 1-16.
- Gewirth, Alan. "There Are Absolute Rights". *The Philosophical Quarterly* 32, No. 129 (1982): 348-353.
- Graffin, Neil. "From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights." In *Law in Motion: 50 Years of Legal Change*, edited by Lisa Claydon, Caroline Derry, and Marjan Ajevski, 52-66. Milton Keynes: The Open University Law School, 2020.
- Graffin, Neil. "Gäfgen v Germany, the Use of Threats and the Punishment of Those Who Ill-Treat During Police Questioning: A Reply to Steven Greer." *Human Rights Law Review* 17, no. 4 (2017): 681-699.
- Greer, Steven. "Constitutionalizing Adjudication under the European Convention on Human Rights." *Oxford Journal of Legal Studies* 23, no. 3 (2003): 405-433.
- Greer, Steven. "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?" *Human Rights Law Review* 15, no. 1 (2015): 101-137.

- Greer, Steven. "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? A Reply to Graffin and Mavronicola." *Human Rights Law Review* 18, no. 2 (2018): 297–307.
- Greer, Steven. "Should Police Threats to Torture Suspects Always Be Severely Punished? Reflections on the Gäfgen Case." *Human Rights Law Review* 11, no. 1 (2011): 67–89.
- Guastini, Riccardo. "Defeasibility, Axiological Gaps, and Interpretation." In *The Logic of Legal Requirements*, edited by Jordi Ferrer Beltrán and Giovanni Battista Ratti, 182–192. Oxford: Oxford University Press, 2012.
- Gunner, Göran. "Religious Freedom as a Human Right." In *Freedom of Religion and Religious Pluralism*, edited by Md Jahid Hossain Bhuiyan and Carla M. Zoethout, 79–100. Studies in Religion, Secular Beliefs and Human Rights no. 16. Leiden/Boston: Brill Nijhoff, 2023.
- Hafner-Burton, Emilie M., Laurence R. Helfer, and Christopher J. Fariss. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." In *Human Rights in Emergencies*, edited by Evan J. Criddle, 83–123. Cambridge: Cambridge University Press, 2016.
- Hafner-Burton, Emilie M., Laurence R. Helfer, and Christopher J. Fariss. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization* 65 (2011): 673–707.
- Hage, Jaap, Antonia Waltermann, and Gustavo Arosemena. "Exceptions in International Law." In *Exceptions and Defences in International Law*, edited by Lorand Bartels and Federica Paddeu, 11–34. Oxford: Oxford University Press, 2020.
- Hartman, Joan F. "Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations." *Harvard International Law Journal* 22, no. 1 (1981): 1–53.
- Hartman, Joan F. "Working Paper for the Committee of Experts on the Article 4 Derogation Provision." *Human Rights Quarterly* 7, no. 1 (1985): 89–131.
- Helfer, Laurence R. "Rethinking Derogations from Human Rights Treaties." *American Journal of International Law* 115, no. 1 (2021): 20–40.
- Heringa, Aalt Willem, and Leo Zwaak. "Right to Respect for Privacy (Article 8)." In *Theory and Practice of the European Convention on Human Rights*, edited by Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak, 663–751. Antwerp: Intersentia, 2006.
- Hickman, Tom R. "Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism." *Modern Law Review* 68, no. 4 (2005): 655–678.
- Invernizzi-Accetti, Carlo. "Reconciling Legal Positivism and Human Rights: Hans Kelsen's Argument from Relativism". *Journal of Human Rights* 17, No. 2 (2018): 215–228.
- Jovanović, Miodrag A., and Ivana Krstić. "Human Rights and the Constitutionalization of International Law." In *Human Rights in the 21st Century*, edited by Tibor Várady and Miodrag Jovanović, 149–172. The Hague: Eleven International Publishing and Serbian Academy of Sciences and Arts, 2020.

- Jovanović, Miodrag. "Jus Cogens: A Complex Case of Constitutional Reasoning in International Law." *Rechtsphilosophie – Zeitschrift für die Grundlagen des Rechts* 3 (2020): 249–263.
- Kalshoven, Frits. "Assistance to the Victims of Armed Conflict and Other Disasters." In *Assisting the Victims of Armed Conflict and Other Disasters*, edited by Frits Kalshoven, 13–26. The Hague: Martinus Nijhoff, 1989.
- Kelsen, Hans. "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" *International Law Quarterly* 1, no. 2 (1947): 153–171.
- Kennedy, Duncan. "Form and Substance in Private Law Adjudication." *Harvard Law Review* 89 (1976): 1685–1778.
- Koji, T. "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights." *European Journal of International Law* 12, no. 5 (2001): 917–941.
- Kramer, Matthew H. "Michael Moore on Torture, Morality, and Law." *Legal Studies Research Paper Series of the University of Cambridge Faculty of Law* (2012): 1–33.
- Kumm, Matthias. "Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review." *European Journal of Legal Studies* 1, no. 1 (2007): 1–20.
- Kunz, Josef L. "General International Law and the Law of International Organizations." *American Journal of International Law* (1953): 456–462.
- Kyriakou, Nikolas. "An Affront to the Conscience of Humanity: Enforced Disappearances in the Case-Law of the Inter-American Court of Human Rights." *Inter-American and European Human Rights Journal*, vol. 7, no. 1–2 (2014): 17–38.
- Leach, Philip. "The European System and Approach." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 407–425. London: Routledge, 2013.
- Lehto, Enni. "Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe." *Helsinki Law Review* 1 (2018): 54–77.
- Levinson, Jerrold. "Gewirth on Absolute Rights". *The Philosophical Quarterly* 32, No. 126 (1982): 73–75.
- Lillich, Richard B. "The Paris Minimum Standards of Human Rights Norms in a State of Emergency." *American Journal of International Law* 79, no. 4 (October 1985): 1072–1081.
- Luban, David J. "Liberalism, Torture and the Ticking Bomb". *Virginia Law Review* 91, (2005): 1425–1461.
- Mackie, John Laslie. "Rights, Utility, and Universalization" in *Utility and Rights*, edited by Raymond G. Frey, 86–106. University of Minnesota Press, 1984.
- Mapuva, Loveness. "Negating the Promotion of Human Rights Through 'Claw-Back' Clauses in the African Charter on Human and People's Rights." *International Affairs and Global Strategy* 51 (2016): 1–4.
- Marauhn, Thilo, and Vera Strobel. "Limitations and Restrictions of Rights." In *Elgar Encyclopedia of Human Rights*, edited by Christina Binder, Manfred Nowak, Jane A.

- Hofbauer, and Philipp Janig, 427–433. Cheltenham/Northampton, MA: Edward Elgar Publishing, 2022.
- Marks, Stephen P. "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts." In *The International Dimensions of Human Rights*, Vol. I, edited by Karel Vasak, 175–212. Paris: UNESCO; Westport, CT: Greenwood Press, 1982.
- Matijević, Milica V. "Some Critical Reflections on the Broad Human Rights Constitutionalisation." In *Constitutio Lex Superioris: Sećanja na profesora Pavla Nikolića*, edited by Oliver Nikolić and Vladimir Čolović. Belgrade: Institute for Comparative Law, 2021.
- Matijević, Milica V., and Ana M. Zdravković. "Some Reflections on the Non-Derogable Character of Freedom of Thought, Conscience and Religion and the Concept of Absolute Human Rights." In *Савремено државно-црквено право*, 743–771. Belgrade: Institute of Comparative Law, 2023.
- Mavronicola, Natasa, and Francesco Messineo. "Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*." *Modern Law Review* 76, no. 3 (2013): 589–603.
- Mavronicola, Natasa. "What Is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights." *Human Rights Law Review* 12, no. 4 (2012): 723–758.
- Mayerfeld, Jamie. "In Defence of the Absolute Prohibition of Torture." *Public Affairs Quarterly* 22, no. 2 (2008): 109–128.
- McNaughton, David. "Deontological ethics" in *Concise Routledge Encyclopedia of Philosophy*, edited by Edward Craig, 202. Routledge, 1999.
- Meisels, Tamar. "Torture and the Problem of Dirty Hands." *Canadian Journal of Law and Jurisprudence* 21 (2008): 149–173.
- Melenko, Serhiy, and Dan Paranyuk. "The Issue of Correlation Between Absolute and Relative Human Rights: Logical-Gnosiological Analysis." *European Journal of Law and Public Administration* 5, no. 1 (2018): 37–45.
- Melenko, Serhiy, and Dan Paranyuk. "To the Issue of Determining the Criteria for Differentiating Human Rights into Absolute and Relative." *European Journal of Law and Public Administration* 6, no. 2 (2019): 101–108.
- Meron, Theodor. "On a Hierarchy of International Human Rights." *American Journal of International Law* 80, no. 1 (1986): 1–23.
- Minkler, Lanse, and Shawna Sweeney. "On the Indivisibility and Interdependence of Basic Rights in Developing Countries." *Human Rights Quarterly* 33, no. 2 (2011): 351–396.
- Moran, Sherwood F. "Suggestions for Japanese Interpreters" in *The Phenomenon of Torture*, edited by William F. Schulz, 249–254. Philadelphia: University of Pennsylvania Press, 2007.
- Nagel, Thomas. "War and Massacre", in *Consequentialism and its Critics*, edited by Samuel Scheffler, 51–73. Oxford: Oxford University Press, 1988.
- Nergelius, Joakim. "Freedom of Religion in Sweden from a Historical Perspective." In *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, edited by Hedvig Bernitz and Victoria Enkvist, 17–26. Oxford: Hart Publishing, 2020.

- Neuman, Gerald L. "Constrained Derogation in Positive Human Rights Regimes." In *Human Rights in Emergencies*, edited by Evan J. Criddle, 15–31. Cambridge: Cambridge University Press, 2016.
- Neuman, Gerald L. "Import, Export, and Regional Consent in the Inter-American Court of Human Rights." *European Journal of International Law* 19, no. 1 (2008): 101–123.
- Ní Aoláin, Fionnuala. "The Cloak and Dagger Game of Derogation." In *Human Rights in Emergencies*, edited by Evan J. Criddle, 137–157. Cambridge: Cambridge University Press, 2016.
- Nickel, James W. "Two Models of Normative Frameworks for Human Rights During Emergencies." In *Human Rights in Emergencies*, edited by Evan J. Criddle, 56–80. Cambridge: Cambridge University Press, 2016.
- Nmehielle, V. O. O. "Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question." *Human Rights Quarterly* 26, no. 3 (2004): 730–759.
- Nowak, Manfred, and Tanja Vospernik. "Permissible Restrictions on Freedom of Religion or Belief." In *Facilitating Freedom of Religion or Belief: A Deskbook*, edited by Tore Lindholm, W. Cole Durham Jr., and Bahia G. Tahzib Lie, 147–172. Dordrecht: Springer, 2004.
- Nowak, Manfred. "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment." *Netherlands Quarterly of Human Rights* 23, no. 4 (2005): 674–688.
- O'Donnell, Daniel. "Commentary by the Rapporteur on Derogation." *Human Rights Quarterly* 7, no. 1 (1985): 23–34.
- Palmer, Stephanie. "A Wrong Turning: Article 3 ECHR and Proportionality." *The Cambridge Law Journal* 65, no. 2 (2006): 438–451.
- Parker, Karen, and Lyn Beth Neylon. "Jus Cogens: Compelling the Law of Human Rights." *Hastings International and Comparative Law Review* 12, no. 2 (1989): 411–463.
- Parry, John T. "Pain, Interrogation, and the Body: State Violence and the Law of Torture." In *Evil, Law and the State: Perspectives on State Power and Violence*, edited by John T. Parry, 1–16. Amsterdam/New York: Rodopi, 2006.
- Pasqualucci, Jo M. "The Right to a Dignified Life (*Vida Digna*): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System." *UC Law SF International Law Review* 31, no. 1 (2008): 1–32.
- Pauwelyn, Joost. "Defences and the Burden of Proof in International Law." In *Exceptions and Defenses in International Law*, edited by Lorand Bartels and Federica Paddeu. Oxford: Oxford University Press, 2020.
- Pejić, Jelena. "The European Court of Human Rights' Al-Jedda Judgment: The Oversight of International Humanitarian Law." *International Review of the Red Cross* 93, no. 864 (2011): 837–851.
- Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19, no. 3 (2006): 579–610.
- Pisillo Mazzeschi, Riccardo, and Alessandra Viviani. "General Principles of International Law: From Rules to Values?" In *Global Justice, Human Rights and the Modernization of*

- International Law*, edited by Riccardo Pisillo Mazzeschi and Pasquale De Sena, 113–163. Cham: Springer, 2018.
- Poggi, Francesca. "Defeasibility, Law, and Argumentation: A Critical View from an Interpretative Standpoint." *Argumentation* 35 (2021): 409–434.
- Quinn, Philip L. "Relativism about Torture: Religious and Secular Responses" in *Religion and Morality*, edited by D.Z. Phillips, 151–171. London: Palgrave Macmillan UK, 1996.
- Raz, Joseph. "Human Rights Without Foundations" in *The Philosophy of International Law*, edited by Samantha Besson, John Tasioulas, 321–339. Oxford: Oxford University Press, 2010.
- Rieff, David. "Review: The Bureaucrat of Torture", *World Policy Journal* 19, No. 1(2002): 105–110.
- Rychlewska, Aleksandra. "The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees." *Polish Yearbook of International Law* 36 (2016): 163–186.
- Sadiković, Lada. "Apsolutno zaštićena ljudska prava." *Kriminalističke teme*, Fakultet kriminalističkih nauka, no. 1–2 (2002): 217–236.
- Sardo, Alessio. "Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights." *Canadian Journal of Law & Jurisprudence* 33, no. 1 (2020): 1–26.
- Sardo, Alessio. "Defettibilità, Ideologia, Contesto." In *Teoria del Diritto e Analisi Logica*, edited by Jorge Rodríguez, 55–71. Madrid: Marcial Pons, 2014.
- Sartor, Giovanni. "Defeasibility in Legal Reasoning." In *The Logic of Legal Requirements*, edited by Jordi Ferrer Beltrán and Giovanni Battista Ratti, 108–136. Oxford: Oxford University Press, 2012.
- Schauer, Frederick. "Is Defeasibility an Essential Property of Law?" In *The Logic of Legal Requirements*, edited by Jordi Ferrer Beltrán and Giovanni Battista Ratti, 77–88. Oxford: Oxford University Press, 2012.
- Schauer, Frederick. "Official Obedience and the Politics of Defining 'Law.'" *Southern California Law Review* 86 (2013): 1165–1194.
- Scheffler, Samuel. "Introduction", in *Consequentialism and its Critics*, edited by Samuel Scheffler, 1–14. Oxford: Oxford University Press, 1988.
- Scheinin, Martin. "Counter-terrorism and Human Rights." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 581–595. London: Routledge, 2013.
- Schlink, Bernhard. "Proportionality in Constitutional Law: Why Everywhere but Here?" *Duke Journal of Comparative and International Law* 22, no. 2 (2012): 291–302.
- Schwarzenberger, Georg. "International Jus Cogens?" *Texas Law Review* 43 (1965): 455–478.
- Schwelb, Egon. "The International Covenants on Human Rights." In *International Protection of Human Rights: Nobel Symposium 7*, edited by Asbjørn Eide and August Schou, 103–130. Oslo: Universitetsforlaget; New York: St. Martin's Press, 1981.
- Sen, Amartya. "Rights and Agency" in *Consequentialism and its Critics*, edited by Samuel Scheffler, 191–196. Oxford: Oxford University Press, 1988.

- Serrano Guzmán, Silvia. "The Transformative Impact of the *Artavia Murillo* Case in In Vitro Fertilization." In *The Impact of the Inter-American Human Rights System*, edited by Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor, and Mariela Morales Antoniazzi, 285–302. Oxford: Oxford University Press, 2024.
- Shafer-Landau, Russ. "Specifying Absolute Rights". *Arizona Law Review* 37 (1995): 209–225.
- Shany, Yuval. "The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativised under Existing International Law?" *Catholic University Law Review* 56 (2006–2007): 837–882.
- Sheeran, Scott, and Catherine Bevilacqua. "The UN Security Council and International Human Rights Obligations: Towards a Theory of Constraints and Derogation." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 371–403. New York: Routledge, 2013.
- Sheeran, Scott. "Human Rights and Derogation in Peacekeeping." In *Human Rights in Emergencies*, edited by Evan J. Criddle, 205–240. Cambridge: Cambridge University Press, 2016.
- Shelton, Dinah and Gould, Ariel. "Positive and Negative Obligations" in *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton, 562–586. Oxford University Press, 2013.
- Shue, Henry. "Torture". *Philosophy and Public Affairs* 7, No. 2 (1978): 124–143.
- Smet, Stijn. "Conflicts between Absolute Rights: A Reply to Steven Greer." *Human Rights Law Review* 13, no. 3 (2013): 469–485.
- Smet, Stijn. "The 'Absolute' Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?" In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, edited by Eva Brems and Janneke Gerards, 273–293. Cambridge: Cambridge University Press, 2013.
- Smith, Rhona K. M. "The Right to Life." In *Textbook on International Human Rights*, edited by Rhona K. M. Smith, 166–167. Oxford: Oxford University Press, 2014.
- Sommario, Emanuele. "Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters." In *International Disaster Response Law*, edited by Andrea de Guttery, Marco Gestri, and Gabriella Venturini, 323–353. The Hague: T.M.C. Asser Press and Springer, 2012.
- Spaić, Bojan. "Institucionalno rješavanje problema semantičke neodređenosti u pravnom tumačenju." In *Savremeni problemi pravne i političke filozofije* (2016): 121–145.
- Stenlund, Mari, and Pamela Slotte. "Forum Internum Revisited: Considering the Absolute Core of Freedom of Belief and Opinion in Terms of Negative Liberty, Authenticity, and Capability." *Human Rights Review* 19 (2018): 425–446.
- Strauss, Marcy. "Torture." *New York Law School Law Review* 48, no. 1 (2004): 201–274.
- Sussman, David. "What's Wrong with Torture?". *Philosophy and Public Affairs* 33, No. 1 (2005): 1–33.
- Tapp, Paige. "To Derogate or Not to Derogate, That Is the Question: A Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights." *International Program Papers* (2019): 116–146.

- Tasioulas, John. "Taking Rights out of Human Rights" in Griffin on Human Rights, edited by Roger Crisp, 9-46. Oxford University Press, 2014.
- Thomson, Judith Jarvis. "The Trolley Problem." *Yale Law Journal* 94 (1985): 1395-1415.
- Tomuschat, Christian. "The Right to Life – Legal and Political Foundations." In *The Right to Life*, edited by Christian Tomuschat, Evelynne Lagrange, and Stefan Oeter, 1-18. Leiden: Martinus Nijhoff, 2010.
- Trapp, Kimberley. "Exemptions, Qualifications, Derogations, and Excuses in International Human Rights Law." In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, 305-327. Oxford: Oxford University Press, 2020.
- Tunkin, Grigory. "Is General International Law Customary Law Only?" *European Journal of International Law* (1993): 534-541.
- Twining, W. L. and Twining P. E. "Bentham on Torture". *Northern Ireland Legal Quarterly* 24 (1973): 305-356.
- Twiss, Sumner B. "Torture, Justification, and Human Rights: Toward an Absolute Proscription". *Human Rights Quarterly* 29 (2007): 346-67.
- Tzevelekos, Vassilis P., and Kanstantsin Dzehtsiarou. "Normal as Usual? Human Rights in Times of COVID-19." *European Convention on Human Rights Law Review* 1, no. 2 (2020): 141-149.
- Udombana, Nsongurua J. "The Third World and the Right to Development: Agenda for the Next Millennium." *Human Rights Quarterly* 22, no. 3 (2000): 753-787.
- Vajić, Nina. "Does Absolute Still Mean Absolute? The *Saadi v. Italy* Judgment of the European Court of Human Rights." In *International Law: New Actors, New Concepts – Continuing Dilemmas; Liber Amicorum Božidar Bakotić*, edited by Budislav Vukas and Trpimir M. Šoškić, 435-452. Leiden: Brill, 2010.
- Van der Wilt, Harmen. "Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test." *Nordic Journal of International Law* 84 (2015): 515-531.
- van Duffel, Siegfried. "Moral Philosophy", in *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton, 33-34. Oxford University Press, 2013.
- Verdross, Alfred. "Jus Dispositivum and Jus Cogens in International Law." *American Journal of International Law* 60 (1966): 55-63.
- Vermeulen, B. P. "Freedom of Thought, Conscience and Religion (Article 9)." In *Theory and Practice of the European Convention on Human Rights*, 4th ed., edited by Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak, 751-771. Cambridge/ Antwerp: Intersentia, 2006.
- Vidmar, Jure. "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" In *Hierarchy in International Law: The Place of Human Rights*, edited by Erika de Wet and Jure Vidmar, 13-42. Oxford: Oxford University Press, 2012.
- Viñuales, Jorge E. "Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law." In *Exceptions in International Law*, edited by Lorand Bartels and Federica Paddeu, 65-87. Oxford: Oxford University Press, 2020.

- Virjan, B. "Principle of Non-Retroactivity of Criminal Law According to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms." *Law Annals of Titu Maiorescu University* (2012): 95–105.
- Wallace, Rebecca M. M. "Religion within the Refugee Context: Squaring the Circle?" In *Freedom of Religion – An Ambiguous Right in the Contemporary European Legal Order*, edited by Hedvig Bernitz and Victoria Enkvist, 195–222. Oxford: Hart Publishing, 2020.
- Webber, Grégoire C. N. "Proportionality and Absolute Rights." In *Proportionality: New Frontiers, New Challenges*, edited by Vicki C. Jackson and Mark Tushnet, 75–99. Cambridge: Cambridge University Press, 2017.
- Weil, Prosper. "Vers une normativité relative en droit international?" *Revue Générale de Droit International Public* 86 (1982): 5–47.
- Wouters, Cornelis Kees. "International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum." In *Routledge Handbook of International Human Rights Law*, edited by Scott Sheeran and Sir Nigel Rodley, 231–245. London: Routledge, 2013.
- Zdravković, Ana. "Few Questions Yet to Be Answered in Regard to the Article 7 of the European Convention on Human Rights." *EU and Comparative Law Issues and Challenges Series (ECLIC)*, no. 4 (2020): 670–698.
- Zdravković, Ana. "Finding the Core of International Law – Jus Cogens in the Work of the International Law Commission." In *South Eastern Europe and the European Union – Legal Issues*, vol. 5, 142–159. Graz: Verlag Alma Mater, 2019.
- Zdravković, Ana. "How It All Began – Exploring the Theoretical Conceptualisations of Absolute Rights." *Revista de Estudios Judiciales*, no. 8 (2024): 5–47.
- Zdravković, Ana. "Ne Bis in Idem in the Jurisprudence of the European Court of Human Rights with Special Emphasis on the Case *Milenković v. Serbia*." *Eudaimonia – Journal for Legal, Political and Social Theory* 5, no. 2 (2021): 53–92.
- Zdravković, Ana. "Obligations *Erga Omnes* – Jus Cogens in *Statu Nascendi*? A Theory Inspired by the Nature of International Law." *Union University Law School Review* 12, no. 2 (2021): 577–593.
- Zdravković, Ana. "Pravo na život sagledano kroz prizmu apsolutnih ljudskih prava." *Pravni život* 12 (2019): 337–355.
- Zdravković, Ana. "The Affair of 'State of Emergency': Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis?" *Iustinianus Primus Law Review* 11 (2021): 1–12.
- Zdravković, Ana. "Uloga Istanbulske konvencije u tumačenju odredbe člana 3. Evropske konvencije o ljudskim pravima." In *Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici – deset godina primene*, edited by Ivana Krstić, 77–97. Belgrade: Pravni fakultet Univerziteta u Beogradu, 2024.

International Conventions

- Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*. 4 November 1950. European Treaty Series No. 5, 213 U.N.T.S. 221.
- Council of Europe. *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. ETS 126, 26 November 1987.
- Council of Europe. *Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*. ETS 187, 3 May 2002.
- Council of Europe. *Protocol No. 6 to the European Convention on Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*. ETS 114, 28 April 1983.
- Declaration of the Rights of Man*. Approved by the National Assembly of France, 26 August 1789. available at https://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 29 April 2025).
- European Union. *Charter of Fundamental Rights of the European Union*. 7 December 2000, 2000/C 364/01.
- League of Arab States. *Arab Charter on Human Rights*. 22 May 2004. Reprinted in 12 International Human Rights Reports 893 (2005).
- Organisation of American States. *American Convention on Human Rights*. 22 November 1969. OAS Treaty Series No. 36, 1144 U.N.T.S. 123.
- Organisation of American States. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*. OAS Treaty Series, no. 73, 8 June 1990. <http://www.oas.org/juridico/english/Sigs/a-53.html> (accessed 29 March 2025).
- Organisation of African Unity. *African Charter on Human and Peoples' Rights*. 27 June 1981. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- United Nations. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations Treaty Series, vol. 1465, p. 85, 10 December 1984.
- United Nations. *Convention Relating to the Status of Refugees*. United Nations Treaty Series, vol. 189, p. 137, 28 July 1951.
- United Nations. *Charter of the United Nations*. 26 June 1945. 1 U.N.T.S. XVI.
- United Nations. *International Convention for the Protection of All Persons from Enforced Disappearance*. 20 December 2006.
- United Nations. *International Covenant on Civil and Political Rights*. 16 December 1966. United Nations Treaty Series, vol. 999, p. 171.
- United Nations. *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966. United Nations Treaty Series, vol. 993, p. 3.
- United Nations. *Rome Statute of the International Criminal Court*. 2187 U.N.T.S. 90, 17 July 1998.

United Nations. *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*. A/RES/44/128, 15 December 1989.

United Nations. *Vienna Convention on the Law of Treaties*. 23 May 1969. United Nations Treaty Series, vol. 1155, p. 331.

Case Law

International Court of Justice

- ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971.
- ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, Dissenting Opinion of Judge Weeramantry, 1-96.
- ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012, Separate Opinion of Judge Cançado Trindade.
- ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment. I.C.J. Reports 1970.
- Permanent Court of International Justice, The Case of the S.S. "Lotus" (France v. Turkey). Judgment of 7 September 1927. P.C.I.J. Ser. A, no. 10.

European (Commission and) Court of Human Rights

- ECommHR, *Cyprus v. Turkey*, App Nos. 6780/74, 6950/75, Report of 10 July 1976, as cited in Holcroft-Emmess, Natasha. "Derogation to Deal with Covid 19: State Practice and Thought on the Need for Notification." *EJIL: Talk! – Blog of the European Journal of International Law*. April 10, 2020. <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/> (accessed 15 June 2025).
- ECommHR, *De Becker v. Belgium*, App. No. 214/56, Report of 8 January 1960.
- ECommHR, *Greece v. UK*, App. No. 176/56, Decision of 2 June 1956.
- ECommHR, *Handyside v. UK*, Report of the Commission, Adopted on 30 September 1975.
- ECommHR, *Ireland v. UK*, Report of 25 January 1976.
- ECommHR, *Lawless v. Ireland*, Report of the Commission adopted on 19 December 1959, Opinion of Mr. Waldock A 51.591.
- ECommHR, *Report of the European Commission of Human Rights on the "Greek Case"*, Yearbook, 12 (1969).
- ECommHR, *Times Newspaper LTD. and others v. UK*, App. No. 6538/74, Report of the Commission, Adopted on 18 May 1977.
- ECtHR, *A and Others v. UK*, App. No. 3455/05, Judgment of 19 February 2009.
- ECtHR, *A. and B. v. Norway*, App. No. 29758/11, Judgment of 15 November 2016.
- ECtHR, *Abdu v. Bulgaria*, App. No. 26827/08, Judgment of 11 March 2014.
- ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, Req. No. P16-2021-001, Advisory Opinion of 26 April 2022.

ECtHR, *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, Concurring Opinion of Judge Harutyunyan.

ECtHR, *Aksoy v. Turkey*, App. No. 21987/93, Judgment of 18 December 1996.

ECtHR, *Al-Adsani v. UK*, App. No. 35763/97, Judgment of 21 November 2001.

ECtHR, *Al-Jedda v. UK*, App. No. 27021/08, Judgment of 7 July 2011.

ECtHR, *Al-Saadoon and Mufdhi v. UK*, App. No. 61498/08, Judgment of 2 March 2010.

ECtHR, *Al-Skeini and Others v. UK*, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello.

ECtHR, *Alexandridis v. Greece*, App. No. 19516/06, Judgment of 21 February 2008.

ECtHR, *Ashingdane v. UK*, App. No. 8225/78, Judgment of 28 May 1985.

ECtHR, *Austin v. UK*, App. No. 39692/09, Judgment of 15 March 2012.

ECtHR, *Babar Ahmad and Others v. UK*, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 24 September 2012.

ECtHR, *Bayatyan v. Armenia*, App. No. 23459/03, Judgment of 7 July 2011.

ECtHR, *Bergmann v. Germany*, App. No. 23279/14, Judgment of 7 January 2016.

ECtHR, *Boso v. Italy*, App. No. 50490/99, Decision of 5 September 2002.

ECtHR, *Brannigan and McBride v. UK*, App. No. 14553/89, 14554/89, Judgment of 25 May 1993.

ECtHR, *Brecknell v. UK*, App. No. 32457/04, Judgment of 27 November 2007.

ECtHR, *Brogan and Others v. UK*, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, Judgment of 29 November 1988.

ECtHR, *Buzadji v. Moldova*, App. No. 23755/07, Judgment of 5 July 2016.

ECtHR, *C. N. and V. v. France*, App. No. 67724/09, Judgment of 11 October 2012.

ECtHR, *Carson and Others v. UK*, App. No. 42184/05, Judgment of 16 March 2010.

ECtHR, *Chahal v. UK*, App. No. 22414/93, Judgment of 15 November 1996.

ECtHR, *Chahal v. UK*, Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits.

ECtHR, *Ciorap v. Moldova*, App. No. 12066/02, Judgment of 19 June 2007.

ECtHR, *Costello-Roberts v. UK*, App. No. 13134/87, Judgment of 25 March 1993.

ECtHR, *D.P. & J.C. v. UK*, App. No. 38719/97, Judgment of 10 October 2002.

ECtHR, *De Becker v. Belgium*, App. No. 214/5, Judgment of 27 March 1962.

ECtHR, *Del Rio Prada v. Spain*, App. No. 42750/09, Judgment of 21 October 2013.

ECtHR, *Deweert v. Belgium*, App. No. 6903/75, Judgment of 27 February 1980.

ECtHR, *Ergi v. Turkey*, App. No. 66/1997/850/1057, Judgment of 28 July 1998.

ECtHR, *Eweida and Others v. UK*, App. Nos. 48420/10, 36516/10, 51671/10, 59842/10, Judgment of 15 January 2013.

ECtHR, *F.G. v. Sweden*, App. No. 43611/11, Judgment of 23 March 2016.

ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, Judgment of 1 June 2010.

ECtHR, *Genovese v. Malta*, App. No. 53124/09, Judgment of 11 October 2011.

ECtHR, *Giuliani and Gaggio v. Italy*, App. No. 23458/02, Judgment of 24 March 2011.

ECtHR, *Gökdemir v. Turkey* App. No. 66309/09, Decision of 19 May 2015.

ECtHR, *Golder v. UK*, App. No. 4451/70, Judgment of 21 February 1975.

ECtHR, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education*, 2024.

ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, 2018.

ECtHR, *Guillot v. France*, App. No. 22500/93, Judgment of 24 October 1993.

ECtHR, *Hassan v. UK*, App. No. 29750/09, Judgment of 16 September 2014.

ECtHR, *Heaney and McGuinness v. Ireland*, App. No. 34720/97, Judgment of 21 December 2000.

ECtHR, *Herczegfalvy v. Austria*, App. No. 10533/83, Judgment of 24 September 1992.

ECtHR, *Hirst v. UK (No. 2)*, App. No. 74025/01, Judgment of 6 October 2005.

ECtHR, *Inze v. Austria*, App. No. 8695/79, Judgment of 28 October 1987.

ECtHR, *Ireland v UK*, App. No. 5310/71, Judgment of 18 January 1978, Separate Opinion of Judge Sir Gerald Fitzmaurice.

ECtHR, *Ireland v. UK*, App. No. 5310/71, Judgment of 18 January 1978.

ECtHR, *Johansson v. Finland*, App. No. 10163/ 02, Judgment of 6 September 2007.

ECtHR, *John Murray v. UK*, App. No. 18731/91, Judgment of 8 February 1996.

ECtHR, *Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment of 15 December 2016.

ECtHR, *Klass v. Germany*, App. No. 5029/71, Judgment of 6 September 1978.

ECtHR, *Kokkinakis v. Greece*, App. No. 14307/88, Judgment of 25 May 1993.

ECtHR, *Kokkinakis v. Greece*, Partly Dissenting Opinion of Judge Martens.

ECtHR, *Kononov v. Latvia*, App. No. 36376/04, Judgment of 17 May 2010.

ECtHR, *Kurić and Others v. Slovenia*, App. No. 26828/06, Judgment of 26 June 2012.

ECtHR, *Kurt v. Turkey*, App. No. 15/1997/799/1002, Judgment of 25 May 1998.

ECtHR, *Leyla Şahin v. Turkey*, App. No. 44774/98, Judgment of 10 November 2005.

ECtHR, *Lopes de Sousa Fernandes v. Portugal*, App. No. 56080/13, Judgment of 19 December 2017, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque.

ECtHR, *Maktouf and Damjanović*, App. Nos. 2312/08, 34179/09, Judgment of 18 July 2013.

ECtHR, *Malone v. UK*, App. No. 8691/79, Judgment of 2 August 1984.

ECtHR, *Marguš v. Croatia*, App. No. 4455/10, Judgment of 27 May 2014.

ECtHR, *Marguš v. Croatia*, Joint Concurring Opinion of Judges Ziemele, Berro-Lefèvre and Karakaş.

ECtHR, *Mathieu – Mohin and Clerfayt v Belgium*, App. No. 9267/81, Judgment of 2 March 1987.

ECtHR, *McBride v. UK*, App. No. 27786/95, Decision of 25 May 1993.

ECtHR, *McCann and Others v. UK*, App. No. 18984/91, Judgment of 27 September 1995.

ECtHR, *Mihalache v. Romania*, App. No. 54012/10, Judgment of 8 July 2019.

ECtHR, *Mikhno v. Ukraine*, App. No. 32514/12, Judgment of 1 September 2016.

ECtHR, *Molie v. Romania*, App. No. 13754/02, Decision of 1 September 2009.

ECtHR, *N. v. UK*, App. No. 26565/05, Judgment of 27 May 2008.

ECtHR, *Nachova and Others v. Bulgaria*, App. Nos. 43577/98, 43579/98, Judgment of 6 July 2005.

ECtHR, *Nagmetov v. Russia*, App. No. 35589/08, Judgment of 30 March 2017.

ECtHR, *Nagmetov v. Russia*, Joint Dissenting Opinion of Judges Raimondi, O’Leary and Ranzoni.

ECtHR, *Nevmerzhitsky v. Ukraine*, App. No. 54825/00, Judgment of 5 April 2005.

ECtHR, *Öcalan v. Turkey*, App. No. 46221/99, Judgment of 12 May 2005.

ECtHR, *Opuz v. Turkey*, App. No. 33401/02, Judgment of 9 June 2009.

ECtHR, *Osman v. UK*, App. No. 23452/94, Judgment of 28 October 1998.

ECtHR, *Podchasov v. Russia*, App. No. 33696/19, Judgment of 13 February 2024.

ECtHR, *Pretty v. UK*, App. No. 2346/02, Judgment of 29 April 2002.

ECtHR, *S. and Marper v. UK*, App. Nos. 30562/04, 30566/04, Judgment of 4 December 2008.

ECtHR, *S. M. v. Croatia*, App. No. 60561/14, Judgment of 25 June 2020.

ECtHR, *S.A.S. v. France*, App. No. 43835/11, Judgment of 1 July 2014.

ECtHR, *S.W. v. UK*, App. No. 20166/92, Judgment of 22 November 1995.

ECtHR, *Saadi v. Italy*, App. No. 37201/06, Judgment of 28 February 2008.

ECtHR, *Sabalić v. Croatia*, App. No. 50231/13, Judgment of 14 January 2021.

ECtHR, *Sakik and Others v. Turkey*, App. Nos. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94, Judgment of 26 November 1977.

ECtHR, *Salabiaku v. France*, App. No. 10519/83, Judgment of 7 October 1988.

ECtHR, *Scoppola v. Italy*, App. No. 10249/03, Judgment of 17 September 2009.

ECtHR, *Selmouni v. France*, App. No. 25803/94, Judgment of 28 July 1999.

ECtHR, *Siliadin v. France*, App. No. 73316/01, Judgment of 26 July 2005.

ECtHR, *Šilih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009.

ECtHR, *Silver and Others v. UK*, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, Judgment of 25 March 1983.

ECtHR, *Sinan Isik v. Turkey*, App. No. 21924/05, Judgment of 2 February 2010.

ECtHR, *Skendžić and Krznarić v. Croatia*, App. No. 16212/08, Judgment of 20 January 2011.

ECtHR, *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989.

ECtHR, *Stewart v. UK*, App. No. 10044/82, Decision of 10 July 1984.

ECtHR, *Stummer v. Austria*, App. No. 37452/02, Judgment of 7 July 2011.

ECtHR, *the Belgian Linguistic Case*, App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968.

ECtHR, *The Sunday Times v. UK*, App. No. 6538/74, Judgment from 26 April 1979.

ECtHR, *Tomasi v. France*, App. No. 12850/87, Judgment of 27 August 1992.

ECtHR, *Tyrer v. UK*, App. No. 5856/72, Judgment of 25 April 1978.

ECtHR, *Valašinas v. Lithuania*, App. No. 44558/98, Judgment of 24 July 2001.

ECtHR, *Van der Mussele v. Belgium*, App. No. 8919/80, Judgment of 23 November 1983.

ECtHR, *Van Der Ven v. Netherlands*, App. No. 50901/99, Judgment of 4 February 2003.

ECtHR, *Vo v. France*, App. No. 53924/00, Judgment of 8 July 2004.

ECtHR, *Vo v. France*, Separate Opinion of Judge Costa, Joined by Judge Traja.

ECtHR, *Wainwright v. UK*, App. 12350/04, Judgment of 26 September 2006.

ECtHR, *Z and Others v. UK*, App. No. 29392/95, Judgment of 10 May 2001.

ECtHR, *Zolotukhin v. Russia*, App. No. 14939/03, Judgment of 10 February 2009.

Human Rights Committee

HRC, *A.P. v. Italy*, Comm. No. 204/1986, CCPR/C/OP/2 (1990).

HRC, CCPR General Comment No. 14: Article 6 (Right to Life) *Nuclear Weapons and the Right to Life*, 9 November 1984.

HRC, CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989.

HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

HRC, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993.

HRC, CCPR General Comment No. 24: *Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, 4 November 1994.

HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999.

HRC, CCPR General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), CCPR/C/21/Rev.1/Add.10, 29 March 2000.

HRC, CCPR General Comment No. 29: Article 4 (Derogations during a State of Emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

HRC, CCPR General Comment No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

HRC, CCPR General Comment No. 32: Article 14, *Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007.

HRC, CCPR General Comment No. 34, Article 19: *Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011.

HRC, CCPR General Comment No. 35, Article 9 (*Liberty and security of person*), CCPR/C/GC/35, 16 December 2014.

HRC, CCPR General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, Article 6: *Right to Life*, CCPR/C/GC/36, 3 September 2019.

HRC, CCPR General Comment No. 7: Article 7 (*Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment*), 30 May 1982.

HRC, *Concluding Observations on Guatemala*. CCPR/C/CO/72/GUA (2001).

HRC, *Concluding Observations on Madagascar*. CCPR/C/MDG/CO/3 (2007).

HRC, *Concluding Observations on Peru*. CCPR/C/PER/CO/5. 2013.

HRC, *Concluding Observations on Thailand*. CCPR/CO/84/THA (2005).

HRC, *Concluding Observations on the Fourth and Fifth Reports of Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003.

HRC, *Concluding Observations on the Second Periodic Report of Israel*, CCPR/CO/78/ISR, 21 August 2003.

HRC, *Concluding Observations on the Syrian Arab Republic*. CCPR/CO/84/SYR (2005).

HRC, *Concluding Observations on Zambia*, CCPR/C/ZMB/CO/3 (2007).

HRC, *Gonzalez del Rio v. Peru*, Comm. No. 263/1987, CCPR/C/46/D/263/1987 (1992).

HRC, *Goyet v. France*, Comm. No. 1746/08, CCPR/C/94/D/1746/2008 (2008).

HRC, *Grioua v. Algeria*, Comm. No. 1327/ 2004, CCPR/C/90/D/1327/2004 (2007)

HRC, *Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche. v. Algeria*, Comm. No. 1328/ 2004, CCPR/C/90/D/1328/2004 (2007).

HRC, *Nystrom v. Australia*, Comm. No. 1557/2007, CCPR/C/102/D/1557/2007 (2011).

HRC, *Vuolanne v. Finland*, CCPR/C/35/D/265/1987 (1989).

HRC, *Zohra Madoui and Menouar Madoui v. Algeria*, Comm. No. 1495, CCPR/C/94/D/1495/2006 (2008).

Inter-American (Commission and) Court of Human Rights

IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010.

IACtHR, *Rochac Hernández et al. v. El Salvador*, Judgment of 14 October 2014.

IACtHR, *Girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005.

IACHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002.

IACommHR, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124 Doc. 5 rev.1, 7 March 2006.

IACommHR, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L./V.II.63, doc. 19 rev. 3 (29 November 1983).

IACommHR, *Roach and Pinkerton v. US*, Case No. 9647, Resolution No. 3/87 (22 September 1987).

IACommHR. *Report on the Situation of Human Rights Defenders in the Americas*. OEA/Ser.L/V/II.124, Doc. 5 rev. 1. 7 March 2006.

IACtHR, Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”, 19 August 2014.

IACtHR, Advisory Opinion OC-24/17, “Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples”, 24 November 2017.

IACtHR, *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006.

IACtHR, *Artavia Murillo and others (“In Vitro Fertilization”) v. Costa Rica*, Judgment from 28 November 2012.

IACtHR, *Case of “The Last Temptation of Christ” (Olmedo – Bustos et al.) v. Chile*, Judgment of 5 February 2001.

IACtHR, *Case of Children’s Rehabilitation v. Paraguay*, Judgment of 2 September 2004.

IACtHR, *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014.

IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment of 22 June 2015.

IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016.

IACtHR, *Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, Judgment of 15 July 2020.

IACtHR. “Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)”. Advisory Opinion OC-5/85 of 13 November 1985 requested by the Government of Costa Rica.

IACtHR, *Brothers Gómez Paquiyauri v. Peru*, Judgment of 8 July 2004, Separate Opinion of Judge Cançado Trindade.

IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003.

IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, Concurring Opinion of Judge Cançado Trindade.

IACtHR, Advisory Opinion OC-8/87, “Habeas Corpus in Emergency Situations”, 30 January 1987.

IACtHR, Advisory Opinion OC-9/87, “Judicial Guarantees in States of Emergency”, 6 October 1987.

IACtHR, *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999.

IACtHR, *Las Palmeras v. Colombia*, Judgment of 4 February 2000, Separate Opinion of Judge Antonio Augusto Cançado Trindade.

IACtHR, *Cantoral-Benavides v. Peru*, Judgment of 18 August 2000.

IACtHR, *Cantoral-Benavides v. Peru*, Judgment of 18 August 2000, Separate and Partially Dissenting Opinion of Judge Fernando Vidal-Ramírez.

IACtHR, *Cantos v. Argentina*, Judgment of 28 November 2002.

IACtHR, *Molina Theissen v. Guatemala*, Judgment of 4 May 2004.

IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004.

IACtHR, *YATAMA v. Nicaragua*, Judgment of 23 June 2005.

IACHR, *Raxcaco Reyes v. Guatemala*, Judgment of 15 September 2005.

IACtHR, *Baldeón García v. Peru*, Judgment of 6 April 2006.

IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006.

IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, Separate Opinion of Judge Antonio Augusto Cançado Trindade.

IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment of 4 July 2007.

IACHR, *Boyce et al. v. Barbados*, Judgment of 20 November 2007.

IACtHR, *Yvon Neptune v. Haiti*, Judgment of 6 May 2008.

IACtHR, *Anzualdo Castro v. Peru*, Judgment of 22 September 2009.

IACtHR, *Gomez Lund et al. v. Brazil*, Judgment of 24 November 2010.

IACtHR, *Gelman v. Uruguay*, Judgment of 24 February 2011.

IACtHR, *J. v. Peru*, Judgment of 27 November 2013.

IACtHR, *Girón and Gómez v. Guatemala*, Judgment of 15 October 2019.

IACtHR, *Petro Urrego v. Colombia*, Judgment of 8 July 2020.

IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000.

IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006.

IACtHR, Advisory Opinion OC-18/03, “Juridical Condition and Rights of Undocumented Migrants”, 17 September 2003.

IACtHR, *Niños de la Calle v. Guatemala*, Judgment of 19 November 1999.

African Commission on Human and People's Rights

ACommHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93, Judgment of 15 November 1999, (2000) AHRLR 297 (ACHPR 1999).

ACommHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, Judgment of 11 October 1995, (2000) AHRLR 66 (ACHPR 1995).

ACommHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98, Decision of 6 November 2000.

ACommHPR, *Legal Resources Foundation v. Zambia*, Comm. No. 211/98, Decision of 7 May 2001.

ACommHPR, *Media Rights Agenda and Others v. Nigeria*, Comm. Nos. 105/93, 128/94, 152/96, Judgment of 31 October 1998.

Other Case-Law

United Nations Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, UN Doc. E/C.12/1/Add.59, 12 December 2001.

CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc. E/1991/23, 14 December 1990.

- CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN Doc. E/C.12/2000/4, 11 August 2000.
- CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, 20 January 2003.
- CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, Statement*, UN Doc. E/C.12/2001/10, 10 May 2001.
- Committee Against Torture (CAT), *Bachan Singh Sogi v. Canada*, CAT/C/39/D/297/2006, Decision of 29 November 2007.
- Court of Justice of the European Union (CJEU), Judgment of 13 April 2000, Case C-292/97.
- House of Lords (UK), *A (FC) and Others v. Secretary of State for the Home Department* ("No 2"), [2005] UKHL 71, prior [2004] EWCA Civ 1123, decided 8 December 2005.
- House of Lords (UK), *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56, on appeal from [2002] EWCA Civ 1502; [2004] EWCA Civ 1123 (CA), decided 16 December 2004.
- International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dražen Erdemović*, Judgment of 29 November 1996.
- International Military Tribunal, *France et al. v. Göring et al.*, Judgment of 1 October 1946.
- Netherlands Special Court of Cassation, *Trial of Hans Albin Rauter*, Case No. 88, Judgment of 12 January 1949.
- Supreme Court of Canada, *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration) and the Attorney General of Canada*, SCC No. 1, Judgment of 11 January 2002.
- Supreme Court of Canada, *Singh v. Minister of Employment and Immigration*, 1 S.C.R. 177, Judgment of 4 April 1985.
- Supreme Court of Canada, *United States v. Burns*, 1 S.C.R. 283, Judgment of 15 February 2001.
- United States Supreme Court, *Boumediene v. Bush*, 553 U.S. 723 (2008). No. 06-1195. 553 U.S. 723, Judgment of 12 June 2008.

Other Sources

- Arnold Vardanyan. "Whether 'Absolute' Means Absolute: Following the ECtHR Advisory Opinion on the Applicability of Statutes of Limitation to the Prosecution, Conviction and Punishment of Torture." *Völkerrechtsblog*, 23 April 2024. <https://voelkerrechtsblog.org/whether-absolute-means-absolute/> (accessed 31 March 2025)
- Council of Europe. *Abolition of the Death Penalty, Timeline*. <https://www.coe.int/en/web/abolition-death-penalty/timeline> (accessed 31 March 2025)
- Council of Europe. *Chart of Signatures and Ratifications of Treaty 187, Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*. ETS 187. <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187> (accessed 31 March 2025)
- Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights II*. 1949.
- Council of Europe. *Collected Edition of the Travaux Préparatoires I and II*. 1975.
- ECtHR. "Strengthening democracy" - Ceremony organised by the Presidency of the Hellenic Republic and the Hellenic Parliament – The inter-State applications against the Greek dictatorship as an acquis of the ECHR case-law - Speech by Marko Bošnjak, Athens, 2024, 4, <https://www.echr.coe.int/documents/d/echr/speech-20241031-bosnjak-presidency-greece-eng> (accessed 15 June 2025)
- ECtHR. *Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency*. 31 August 2024.
- ECtHR. *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention – Prohibition of Discrimination*. 31 August 2024.
- ECtHR. *Guide on Article 4 of the European Convention on Human Rights*. 31 August 2024.
- Marloes Susanna Bulthuis. *The Illusion of Absoluteness? – Theory and Practice of the Absolute Prohibition of Torture, Inhuman or Degrading Treatment or Punishment under the European Convention of Human Rights*. Master's thesis, University of Luxembourg, 2018.
- Office of the United Nations High Commissioner for Refugees. *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*. 26 January 2007.
- Office of the United Nations High Commissioner for Refugees. *Note on Burden and Standard of Proof in Refugee Claims*. 16 December 1998. <https://www.refworld.org/policy/legalguidance/unhcr/1998/en/23696> (accessed 31 March 2025)
- Stanley Cohen. "Post-Moral Torture: From Guantanamo to Abu Ghraib." *Index on Censorship* 34 (2005).
- Tom Casier. "A Classic Dilemma: Russia's Threat to Withdraw from the Council of Europe." *Heinrich Böll Stiftung*, 21 February

2018. <https://eu.boell.org/en/2018/02/21/classic-dilemma-russias-threat-withdraw-council-europe> (accessed 31 March 2025)

- United Nations Committee Against Torture, "Statement in Connection with the Events of 11 September 2001." In *Report of the Committee Against Torture on Its Twenty-Seventh Session (12–23 November 2001)*, UN Doc. A/57/44, paras. 17–18, 22 November 2001.
- United Nations, Economic and Social Council. *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2001/62*. E/CN.4/2002/76, 27 December 2001.
- United Nations, General Assembly. *Interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed - Freedom of thought*, A/76/380, 5 October 2021.
- United Nations, General Assembly. *Resolution on Moratorium on the Use of the Death Penalty*. A/RES/79/179, 17 December 2024. <https://digitallibrary.un.org/record/4069732>. Accessed 31 March 2025.
- United Nations, Human Rights Council. *Freedom of Religion or Belief and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Report of the Special Rapporteur on Freedom of Religion or Belief, Nazila Ghanea*. A/HRC/58/49, 9 January 2025.
- United Nations, Human Rights Council. *Report of the Special Rapporteur on Freedom of Religion or Belief*. A/HRC/31/18, 23 December 2015.
- United Nations, Human Rights Council. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Manfred Nowak*. A/HRC/13/39/Add.5, 5 February 2010.
- United Nations, International Law Commission. *First Report on Peremptory Norms of General International Law (Jus Cogens)* by Dire Tladi, Special Rapporteur. UN Doc. A/CN.4/693, 12 August 2016.
- United Nations, International Law Commission. *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)* by Dire Tladi, Special Rapporteur. . UN Doc. A/CN.4/727, 31 January 2019.
- United Nations, International Law Commission. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi. UN Doc. A/CN.4/L.682, 13 April 2006.
- United Nations, International Law Commission. *Report of the International Law Commission on the Work of Its Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*. Official Records of the General Assembly, Sixty-Ninth Session, Supplement No. 10, UN Doc. A/69/10, 2014.
- United Nations, International Law Commission. *Report of the International Law Commission on the Work of Its Seventy-First Session*. UN Doc. A/74/10, 2019.
- United Nations, International Law Commission. *Second Report on Jus Cogens* by Dire Tladi, Special Rapporteur. . UN Doc. A/CN.4/706, 16 March 2017.
- United Nations, International Law Commission. *Yearbook of the International Law Commission 1966, Vol. II: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session*. UN Doc. A/CN.4/SER.A/1966/Add.1. New York: United Nations, 1967.

United Nations Office of the High Commissioner for Human Rights. *Vienna Declaration and Programme of Action*. Adopted by the World Conference on Human Rights, Vienna, 25 June 1993.

United Nations. *Amid Growing Use of Enforced Disappearances by Non-State Actors, Secretary-General Urges Prompt Action in Message on International Day Commemorating Victims*. Press Release SG/SM/17038-OBV/1508, 28 August 2015. <https://press.un.org/en/2015/sgsm17038.doc.htm>. (accessed 31 March 2025)

Websites

- "A Guide to the Memos on Torture." *The New York Times*. n.d. <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html> (accessed 17 June 2023)
- Alexander, Larry, and Michael Moore. "Deontological Ethics." *Stanford Encyclopedia of Philosophy*, 30 October 2020. <https://plato.stanford.edu/entries/ethics-deontological/>. (accessed 2 December 2023)
- All Answers Ltd. "The Two UN Covenants on Human Rights." *Law Teacher*, 2013. <https://www.lawteacher.net/free-law-essays/international-law/the-two-un-covenants-on-human-rights-international-law-essay.php?vref=1>. (accessed 15 June 2025)
- Al-Shahi, Ahmed S., and Ahmad Alawad Sikainga. "Conflict in Darfur." *Encyclopedia Britannica*, December 4, 2024. <https://www.britannica.com/place/Sudan> (accessed 15 June 2025)
- Aust, Anthony. "Treaties, Termination." *Max Planck Encyclopedia of Public International Law*, 2006. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1491> (accessed 15 June 2025)
- Bergen, Peter L. "September 11 Attacks." *Encyclopedia Britannica*, March 17, 2023. <https://www.britannica.com/event/September-11-attacks> (accessed 17 June 2023)
- Dzehtsiarou, Kanstantsin. "COVID-19 and the European Convention on Human Rights." *Strasbourg Observers*, March 27, 2020. <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>. (accessed 15 June 2025)
- Greene, Alan. "States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic." *Strasbourg Observers*, April 1, 2020. <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>. (accessed 15 June 2025)
- International Committee of the Red Cross. "How Does Law Protect in War?" Online Casebook. https://casebook.icrc.org/a_to_z/glossary/lex-specialis. (accessed 9 December 2024)
- Statista Research Department. "Deadliest Terrorist Attacks Worldwide 1970–2020, by Number of Fatalities." *Statista*, September 2, 2022. <https://www.statista.com/statistics/1330395/deadliest-terrorist-attacks-worldwide-fatalities/> (accessed 17 June 2023)
- Wallenfeldt, Jeff. "The Troubles." *Encyclopedia Britannica*, November 26, 2024. <https://www.britannica.com/event/The-Troubles-Northern-Ireland-history> (accessed 9 December 2024)
- Yoo, John. "The Supreme Court Goes to War." *The Wall Street Journal*, June 17, 2008. <https://www.wsj.com/articles/SB121366596327979497> (accessed 17 June 2023)

ANNEXES FOR THE UNIVERSITY OF BELGRADE

Annex 1 - Extended abstract of the doctoral dissertation in Serbian language

(**Prilog 1** - Produženi rezime doktorske disertacije na srpskom jeziku)

Annex 2 - Author's biography

(**Prilog 2** - Biografija autorke)

Annex 3 - Accompanying declarations in Serbian language

(**Prilog 3** - Prateće izjave na srpskom jeziku)

Annex 1 - Extended Abstract of the Doctoral Dissertation in Serbian language
(Prilog 1 - Produženi rezime doktorske disertacije na srpskom jeziku)

Predmet i cilj istraživanja

Predmet ove doktorske disertacije je konceptualna analiza pojma apsolutnih ljudskih prava, čiji je cilj njegovo jasno teorijsko razgraničenje od srodnih pravnih instituta i koncepata. Premda je postojanje apsolutnih prava u literaturi često osporavano, ovaj pojam je već dugo u središtu intenzivnih diskusija u naučnim krugovima, što se može smatrati i indikatorom njegovog značaja. Ipak, ne postoji opšteprihvaćena definicija ovog pojma, već se predloži malobrojnih autora o njegovim karakteristikama znatno razlikuju i variraju od ekstenzivnih definicija, prema kojima se apsolutna prava nikada ne mogu ograničiti niti suspendovati, bilo da se radi o vanrednom stanju ili redovnim okolnostima, do restriktivnih određenja pojma, koja se mogu podeliti u dve grupe. Dok je za pojedine autore nederogabilni karakter prava jedini kriterijum razlikovanja apsolutnih od ostalih ljudskih prava, jer nederogabilnost percipiraju kao karakteristiku koja je toliko važna da normi pruža poseban kvalitet, drugi zastupaju stanovište da su apsolutna prava ona prava koja se ne mogu fakultativno ograničiti, odnosno na koje nije moguće primeniti test proporcionalnosti, bez obzira na to da li su nederogabilna ili ne.

Koncept apsolutnih prava prisutan je u jurisprudenciji maltene svih međunarodnih sudova i kvazi-sudskih tela, zbog čega za ovu disertaciju pitanje postojanja apsolutnih ljudskih prava nije bilo u fokusu. Ono je neminovno iskršavalo tokom analize i bila mu je posvećena određena pažnja, no, može se reći da je polazna pretpostavka ovog istraživanja bila da apsolutna ljudska prava postoje, ali da nije dovoljno jasno šta ona tačno predstavljaju. Navedeno jasno proizilazi iz okolnosti da međunarodna tela kvalifikuju određena prava kao apsolutna, ali se uzdržavaju od pružanja jasnog određenja šta pod tim atributom podrazumevaju. Dakle, nadzorni mehanizmi ne definišu navedeni pojam, već ga koriste kao opšteprihvaćeni termin i oslanjaju se na njegovo uobičajeno, pretpostavljeno značenje. Primera radi, Komitet za ljudska prava je u Opštem komentaru o pravu na život istakao da ovo pravo nije apsolutno, bez detaljnijeg pojašnjenja, što zapravo podrazumeva da je morao pretpostaviti određeno značenje pojma, pre nego što je pristupio kvalifikaciji prava kao apsolutnog ili odricanju takvog statusa.

Sve i kada je neka vrsta objašnjenja pružena, a ona su pre svega prisutna u praksi Evropskog suda za ljudska prava, nedovoljno su jasna jer se oslanjaju na jednu drugu, podjednako nedefinisano pravnu kategoriju, a to su ograničenja ljudskih prava. U tom smislu, precizna sistematizacija različitih vrsta ograničenja ljudskih prava pokazala se neophodnom za predmetnu konceptualizaciju, s tim da ona ima i šire implikacije, jer može da pomogne u izoštravanju doktrinarnog i sudijskog rezonovanja i, uopšte, u razumevanju i zaštiti ljudskih prava.

Značaj teme ograničenja ljudskih prava za predmet istraživanja proizilazi iz inicijalno postavljenih hipoteza, kojima su apsolutna prava stipulativno definisana kao ona koja se ne mogu derogirati, fakultativno ograničiti ili sadržati inherentna ograničenja. Da bi se ove hipoteze proverile, najpre je bilo neophodno pojasniti značenje pomenutih ograničenja i njihov domašaj, te analiza ograničenja ljudskih prava zapravo predstavlja „drugu stranu medalje“ u razumevanju pojma apsolutnih ljudskih prava.

Nakon sveobuhvatnog i sistematičnog istraživanja i analize doktrinarnih stavova i argumenata o značenju pojma apsolutnih ljudskih prava, koji nužno podrazumevaju i

ispitivanje opravdanosti kvalifikacije određenog prava kao apsolutnog, ali i prakse i pristupa međunarodnih tela, primarni cilj rada je bio razjašnjenje pojma i pronalazak najprikladnije definicije i karakteristika apsolutnih ljudskih prava. Usvajanje konačnog značenja pojma apsolutnih ljudskih prava omogućilo je ostvarivanje dodatnog cilja istraživanja, a to je utvrđivanje konkretnih prava koja zadovoljavaju uslove postavljene definicijom apsolutnih ljudskih prava, kao i ispitivanje da li se različita prava smatraju apsolutnim ljudskim pravima u različitim pravnim sistemima, te sačinjavanje liste koja je zajednička svim analiziranim sistemima, odnosno prava koja čitava međunarodna zajednica smatra apsolutnim ljudskim pravima.

Naposletku, identifikacija posebne kategorije ljudskih prava, a naročito postojanje prava koja svi članovi međunarodne zajednice smatraju apsolutnim ljudskim pravima, nužno otvara pitanje njihovog položaja unutar sistema opšteg međunarodnog prava. Bliska je veza ovog pitanja sa širom dilemom našeg doba - konstitucionalizacijom međunarodnog prava, koja se može posmatrati iz perspektive dva međusobno povezana cilja koja teži da postigne, a to su stvaranje unifikovanog i hijerarhijski ustrojenog međunarodnopravnog sistema normi i uspostavljanje ograničenja arbitrnom vršenju vlasti od strane država i drugih međunarodnopravnih aktera. Imajući u vidu očiglednu povezanost koncepta apsolutnih ljudskih prava i kogentnih normi međunarodnog prava, s obzirom na to da se nederogabilnost pojavljuje kao suštinska karakteristika i jednih i drugih, krajnji cilj istraživanja bio je ispitivanje ovog odnosa, kao i položaja apsolutnih prava u hijerarhiji međunarodnopravnih normi, koja se od prihvatanja koncepta kogentnih normi više ne može ozbiljno osporavati.

Metodologija istraživanja

Imajući u vidu da je primarni cilj disertacije objašnjenje pojma apsolutnih ljudskih prava, konceptualna analiza je predstavljala glavni metod istraživanja, putem koje je izgrađena definicija, odnosno utvrđene su najvažnije karakteristike ovog koncepta. Pored analize jezičke upotrebe termina, kojim se predmetni pojam denotira, i njihovog specifičnog značenja u međunarodnom pravu, definisanje pojma apsolutna ljudska prava izvršeno je i njegovim razgraničenjem od povezanih pojmova, poput ograničenja ljudskih prava ili *jus cogens* normi. Cilj primene konceptualne analize jeste da se razjasni misaoni, konceptualni okvir koji se koristi u međunarodnoj sudskoj praksi, odnosno da se taj okvir usavrši. Premda otkrivanje tih analitičkih istina o konceptu ne bi trebalo da počiva na empirijskim istraživanjima, već na intuitivnoj analizi sadržine koncepta, predmet ovog istraživanja je pravni institut, te su nalazi iz sudske prakse neophodna polazna osnova za svako dalje promišljanje o pojmu koje za cilj ima realističan i upotrebljiv teorijski okvir. U tom smislu, korišćeni su i drugi, komplementarni metodi, koji su omogućili da ova analiza bude sveobuhvatna i logički dosledna.

Tako je, na primer, sagledavanje razvoja i suštine rasprave o apsolutnim ljudskim pravima iziskivalo upotrebu istorijskog metoda, jer je poznavanje različitih teorijskih pristupa, kritika i objašnjenja koje su pravna teorija i praksa do sada iznedrile, bilo neophodno za sveobuhvatno razumevanje predmetnog fenomena. U prvom delu rada, koji je posvećen pregledu teorijskih shvatanja, ali i u kasnijim delovima koji istražuju praksu različitih međunarodnih tela, komparativnom analizom izvršeno je upoređivanje eventualno različitih stavova povodom istih pitanja.

Zatim, primenom dogmatskog metoda izvršena je analiza i tumačenje različitih međunarodnih ugovora iz oblasti ljudskih prava. U tim misaonim operacijama neizbežno

je i teleološko tumačenje, s obzirom na poseban značaj namere tvoraca određene pravne norme i međunarodne konvencije. Tako se, recimo, za obradu ove teme moraju uzeti u obzir *travaux préparatoires* kako bi se utvrdilo značenje nederogabilnosti prava za stvaraoce međunarodnih ugovora. U istraživanju međunarodne prakse upotrebljavan je i induktivni metod, jer su se na osnovu pristupa različitih sudova pojmu apsolutnih ljudskih prava u konkretnim slučajevima izvodili zaključci o opštem značenju i položaju ovog pojma u širem međunarodnopravnom kontekstu.

Prilikom upoređivanja prava koja se smatraju apsolutnim ljudskim pravima u svakom od sistema zaštite ljudskih prava, na delu je bio uporednopravni metod, sa ciljem da se iskristališu bitna obeležja instituta apsolutnih ljudskih prava, da se pronade najadekvatniji pristup ovom konceptu i da se utvrde prava koja se u svim sistemima smatraju apsolutnim ljudskim pravima.

Kratak pregled sadržaja

Sadržaj disertacije podeljen je na pet poglavlja, pored uvoda i zaključnih razmatranja.

Prvo poglavlje daje osvrt na (moralno) filozofske debate o apsolutnim pravima koje tradicionalno okupiraju jedan broj rasprava iz ove oblasti. Cilj ovog pregleda literature nije bio proglašavanje jedne etičke teorije za najispravniju, već sagledavanje argumenata koji su i dalje prisutni u literaturi, poput deontološkog odbijanja bilo kakvih kompromisa u smislu balansiranja ili konsekvencijalističke strepnje povodom terorističkih bombi u hipotetičkim scenarijima, kao i hibridnih stavova koji razvodnjavaju samu ideju o kategoričnosti i isključivanju izuzetaka. U poglavlju je jasno pokazano da su se stavovi značajno promenili usled neke vrste kolektivnog osećaja strepnje koji je preovladao u međunarodnoj zajednici nakon 11. septembra 2001. godine. Značaj ovog terorističkog napada za predmet istraživanja pre svega je u tome što je događaj potvrdio osnovnu karakteristiku vanrednog stanja - najvažnije norme moraju ostati zaštićene i imune čak i u trenucima kada državi najmanje odgovaraju. Opisana pojava potvrđena je i tokom nedavne pandemije virusom COVID-19, koja je ponovo pokazala inklinaciju država da zloupotrebljavaju ljudska prava u vanrednim situacijama u kojima je sprovođenje kontrole i nadzora otežano. Svi navedeni uvidi postavili su temelje za ostatak analize.

Sledeći deo disertacije otkrio je ne samo da postoji zabuna u stručnoj literaturi u vezi sa različitim pojmovima povezanim sa ograničenjima ljudskih prava, već i da su mnogi međunarodni ugovori upali u zamku terminološke nedoslednosti. Stoga je nakon sveobuhvatnog istraživanja normativnih tekstova i pristupa međunarodnih sudova ovoj temi, ponuđena sistematizacija različitih tipova ograničenja ljudskih prava, te je u disertaciji predloženo da bi termin „ograničenja“ trebalo koristiti kao opšti pojam, koji obuhvata četiri vrste ograničenja.

Na prvom mestu, ograničenja mogu poprimiti oblik derogacije, koja predstavlja privremenu suspenziju ljudskih prava tokom ratnog ili vanrednog stanja. Derogacija ljudskih prava zapravo podrazumeva ovlašćenje države da privremeno, u izuzetnim, vanrednim okolnostima suspenduje poštovanje pojedinih ljudskih prava i sloboda. Međunarodni ugovori o ljudskim pravima tradicionalno sadrže derogacionu klauzulu, čime zapravo prepoznaju da je u određenim slučajevima normalni poredak unutar države ugrožen, da nema uslova za redovno funkcionisanje državnih organa, te da država može opravdano biti sprečena da poštuje sve ono što je, pristupanjem tom ugovoru, zagarantovala pojedincima u svojoj nadležnosti. Da bi aktivirala mehanizam derogacije država je dužna da poštuje sve uslove propisane navedenim međunarodnim dokumentima,

poput obaveznog proglašenja stanja javne opasnosti, obaveznog obaveštavanja međunarodnih organa o takvom stanju i suspenziji konkretnih ljudskih prava i sloboda i vremenskih ograničenja. Štaviše, međunarodnim ugovorima propisana su nederogabilna prava koja država nikada ne može staviti van snage. Dakle, i pored krajnje izuzetnosti ove mere, postoje neka prava koja su toliko važna da je država dužna da obezbedi njihovu zaštitu uvek i pod svim, čak i najtežim, okolnostima. Zbog toga je malo argumenata protiv stava da je nederogabilnost suštinska karakteristika apsolutnih ljudskih prava, te je u disertaciji ova hipoteza i potvrđena, uz zaključak da su sva apsolutna prava nederogabilna, ali sva nederogabilna prava nisu apsolutna, jer je nederogabilnost samo jedan od uslova za apsolutni status.

Zatim, drugi tip su *ad hoc* ograničenja, koja su takođe propisana međunarodnim ugovorima o ljudskim pravima, konkretno limitacionim klauzulama, koje ovlašćuju državu ugovornicu da uvek, što znači i u redovnim okolnostima, u skladu sa zakonom, radi postizanja propisanih legitimnih ciljeva i u opštem društvenom interesu, ograniči uživanje pojedinih prava i sloboda. Dodatno, država može primeniti ovaj tip ograničenja samo pod uslovom da su ona proporcionalna potrebi postizanja nekog od legitimnih ciljeva. Dakle, fakultativna ograničenja podrazumevaju balansiranje između suprotstavljenih interesa, odnosno ljudskog prava sa jedne strane i nekog od propisanih legitimnih ciljeva, sa druge strane, i davanje prioriteta jednom ili drugom, dok bi apsolutna ljudska prava trebalo da garantuju kategoričku prednost zaštićenom dobru. Drugim rečima, u slučaju sukoba dva interesa od kojih je jedan apsolutno ljudsko pravo, tas vage bi uvek trebalo da pređe na stranu tog prava. U suprotnom, ono više ne bi bilo apsolutno zaštićeno.

Sa teorijskog stanovišta, objašnjenje ove vrste ograničenja može biti u podeli pravnih normi na pravila i principe, zbog čega je ova tema u disertaciji posebno obrađena. Naime, većina nederogabilnih prava formulisana je u formi zabrana, zbog čega bi se moglo zaključiti da ona jesu pravila, definitivne naredbe, formulisana na način sve-ili-ništa, koja se samo primenjuju ili ne primenjuju. Suprotno, prava koja su fakultativno ograničena, funkcionišu po sistemu principa, jer se ostvaruju u najvećoj mogućoj meri. Kao optimizujuće naredbe, principi bivaju ispunjeni u različitim stepenima, odnosno u zavisnosti od suprotstavljenih pravila i principa. Tako i fakultativno ograničena prava kolidiraju legitimnim ciljevima navedenim u limitacionim klauzulama, i jedan od njih uvek odnosi prevagu, od čega zavisi da li će u konkretnom slučaju pravo biti fakultativno ograničeno ili neće.

U svakom slučaju, u disertaciji je i ova hipoteza potvrđena. Apsolutna ljudska prava jesu definisana kao prava koja ne mogu doći u sukob sa drugim apsolutnim pravima, dok u slučaju sukoba sa relativnim pravima, uvek odnose prevagu, te ne mogu biti predmet testa proporcionalnosti, a samim tim ni *ad hoc* ograničenja.

Sledeća vrsta identifikovanih ograničenja jesu ona implicitna, koja sudovi dopuštaju u pogledu prava koja ne sadrže limitacione klauzule, ali u praksi funkcionišu po istom sistemu kao *ad hoc*, fakultativna ograničenja, osim što kod njih nisu unapred određeni legitimni ciljevi. Ova karakteristika je kritikovana u radu, jer ima potencijal da naškodi pravnoj sigurnosti i ostavlja širok diskrecioni prostor donosiocima odluka. Analogno fakultativnim ograničenjima, a utemeljeno na utvrđenim stavovima međunarodnih sudova, zaključeno je i da apsolutna prava ne mogu biti podvrgnuta implicitnim ograničenjima.

Konačno, u disertaciji je sistematizovan još jedan tip ograničenja, koja se retko analiziraju u literaturi, a to su takozvana inherentna (ugrađena) ograničenja, koja predstavljaju precizno nabrojane i definisane izuzetke od određenog ljudskog prava, odnosno slučajeve koji se neće smatrati povredom tog zajemčenog prava. Drugim rečima, to su unapred jasno

definisani izuzeci u vidu iscrpno nabrojanih slučajeva odstupanja koji su ugrađeni u samo određenje prava sadržanog u konkretnoj pravnoj normi. Ovo je posebno interesantno, jer čak i pojedina nederogabilna prava sadrže ova ograničenja, poput prava na život u Evropskoj konvenciji o ljudskim pravima. Drugim rečima, izričito su propisani slučajevi u kojima se neželjena posledica u vidu lišenja života usled, na primer, odbrane lica od nezakonitog nasilja, pokušaja zakonitog hapšenja ili sprečavanja bekstva lica zakonito lišenog slobode ili suzbijanja nereda ili pobune, neće smatrati povredom prava na život. Premda je konceptualizacija ove poslednje vrste bila posebno izazovna, usled nedostatka izvora i iscrpne obrade ove kategorije, istraživanje je pokazalo neophodnim da se ona odvoji od drugih vrsta ograničenja, s obzirom na njene specifične karakteristike, a u disertaciji je predloženo i da joj se dodeli poseban, prikladniji naziv, te da se ubuduće obeležava terminom „unapred precizno određeni izuzeci“. Zaključeno je da apsolutna prava ne mogu sadržati ove izuzetke, te da se, samim tim, pravo na život ne može smatrati apsolutnom, već da takav status uživa isključivo zabrana arbitrarnog lišenja života.

Koristi od ove sistematizacije nisu samo terminološke prirode, jer ona poseduje potencijal da unese strukturu i preciznost kako u teorijska razmatranja, tako i u sudsku praksu i izoštri način na koji sudovi o njima rezonuju. Poglavlje je obuhvatilo i druge relevantne nedoumice u vezi sa svakom vrstom ograničenja, poput, na primer, pitanja da li je derogacija odgovarajući oblik reakcije na vanredna stanja, upoređujući je sa alternativnim pristupima kao što su otkazivanje međunarodnih ugovora, stanje nužde i *lex specialis*. Međutim, nakon sveobuhvatne komparativne analize, zaključeno je da je na trenutnom nivou razvoja međunarodnog prava derogacija ipak najadekvatniji mehanizam. U ovom delu rada ispitivani su i uslovi neophodni da derogacija bude prihvaćena kao punovažna i zakonita, sa posebnim osvrtom na sporne i nerešene aspekte, kao što je pitanje posledica neobaveštavanja nadzornih tela, te je u disertaciji prisutan i apel da se što pre ova pitanja reše i razjasne od strane nadležnih organa, što je neophodno zarad doslednije primene ovog mehanizma od strane država. Posebna pažnja u poglavlju posvećena je institutu nederogabilnosti, imajući u vidu njegov presudni značaj za temu disertacije, te su razmatrane različite ideje koje bi mogle stajati iza nederogabilnih prava. Istaknuta je i tvrdnja da postoje indicije da je pravilo o nederogabilnosti određenih prava postalo deo međunarodnog običajnog prava.

U fokusu trećeg poglavlja su nederogabilna prava, koja su kao takva predviđena derogacionim klauzulama međunarodnih ugovora, odnosno Evropskom konvencijom o ljudskim pravima, Međunarodnom paktu o građanskim i političkim pravima i Američkom konvenciji o ljudskim pravima. Uporednopravna analiza prakse nadzornih mehanizama ovih ugovora pokazala je da, s jedne strane, sudovi i kvazisudska tela redovno koriste retoriku apsolutnosti, ali se, sa druge strane, presude često oslanjaju na pretpostavljeno značenje ovog pojma, umesto da ga jasno definišu ili ukažu na to kakve su njegove praktične implikacije. Rezultati istraživanja su pokazali da autoritet apsolutnih prava više počiva na deklarativnim izjavama nego na posledicama prisutnim u dobro obrazloženim sudskim odlukama, iako se ne može tvrditi da nema razlike u pristupu apsolutnim u odnosu na relativna prava. Premda uloga pionira i u ovoj materiji svakako pripada Evropskom sudu za ljudska prava, pri čemu je Komitet za ljudska prava često usvajao slične stavove, važno je istaći i da je Međuamerički sud za ljudska prava u velikom broju slučajeva koristio ovu kvalifikaciju, odlazeći čak i korak dalje i proglašavajući određena prava i apsolutnim pravima i *jus cogens* normama. Istraživanje je otkrilo da se ovakav razvoj, zajedno sa činjenicom da od tri ispitana međunarodna ugovora Američka konvencija o ljudskim pravima sadrži najduži spisak nederogabilnih prava, može pripisati specifičnim istorijskim okolnostima ovog regiona. Takođe, u poglavlju su obrađeni i slučajevi u kojima su određena

prava tretirana kao apsolutna, a da ih sudovi nisu eksplicitno karakterisali kao takva. Svi ovi nalazi bili su ključna motivacija i jasna potvrda potrebe za konceptualnom analizom koja je usledila.

Dakle, centralno poglavlje disertacije daje definiciju apsolutnih ljudskih prava, navodeći da su to prava koje pružaju zaštitu putem kategoričkih zabrana i koja ne mogu biti podvrgnuta ograničenjima ljudskih prava, jer su nederogabilna, ne sadrže limitacionu klauzulu, niti mogu biti podvrgnuta implicitnim ograničenjima, te nemaju unapred određene precizne izuzetke, i ne mogu biti predmet analize proporcionalnosti, a kad god su ispunjeni uslovi za njihovu primenu, sudovi ih moraju primeniti, te ne mogu biti podvrgnuta institutu difizibilnosti. Ova prava su nužno formulisana u negativnom obliku, u vidu zabrana, jer samo tako precizna formulacija nudi nedvosmislene smernice u vezi sa uzdržavanjem koje se od države očekuje, odnosno radnjama koje se moraju izbegavati. Takva kategorička ili-ili preciznost ne može se očekivati u pogledu drugih (relativnih) ljudskih prava i sloboda. Pored toga, iz ovog poglavlja je očigledno da značaj apsolutnih ljudskih prava naročito proizilazi iz činjenice da ona pružaju najjaču zaštitu ljudskom dostojanstvu, što je prepoznato i u pravnoj teoriji i u sudskoj praksi. Teorija o apsolutnim ljudskim pravima, dakle, izgrađena je oslanjajući se na doktrinarne i sudske stavove, uz određene korekcije koje imaju za cilj da obezbede sveobuhvatan okvir koji će doleteti kritikama i izazovima, što je svojstveno svakom konceptualnom poduhvatu. Drugim rečima, disertacija je nastojala da izgradi teorijski okvir formiran na relevantnim empirijskim uvidima.

Ponudena konceptualizacija svakako teži da ima praktične implikacije, te se može koristiti kao mehanizam za identifikaciju apsolutnih ljudskih prava. U tom smislu, unutar poglavlja može se pronaći i lista apsolutnih prava koja su prepoznata u sva tri analizirana ugovora, a to su zabrana arbitrarnog lišenja života (uključujući apsolutnu zabranu prisilnih nestanaka), zabranu mučenja, (okrutnog,) nečovečnog ili ponižavajućeg postupanja ili kažnjavanja, uključujući zabranu *refoulement*, zabranu ropstva i ropskog položaja i zabranu retroaktivne primene krivičnog zakonodavstva. Zabrana smrtne kazne je takođe apsolutna, ali samo u okviru sistema Evropske konvencije o ljudskim pravima, dok Pakt o građanskim i političkim pravima sadrži dodatne apsolutne zabrane mešanja u misli, savest i veroispovest i prinude koja bi uticala na slobodu ispovedanja ili prihvatanja veroispovesti ili uverenja po slobodnom izboru. Za Američku konvenciju o ljudskim pravima, apsolutne su i zabrana mešanja u savest i veroispovest i zabrana ograničenja koja bi mogla uticati na slobodu lica da zadrži ili promeni svoju veroispovest ili uverenja. Konačno, poslednja dva ugovora dele još jedno apsolutno pravo, sadržano u zabrani uskraćivanja pravnog subjektiviteta.

U završnom poglavlju disertacije analiziran je položaj apsolutnih prava unutar normativne hijerarhije međunarodnog prava, uključujući i kontroverzni aspekt koji se odnosi na konstitucionalizaciju međunarodnog pravnog poretka. Efekti faktičke konstitucionalizacije prvi put su prepoznati usvajanjem doktrine o kogentnim normama međunarodnog prava. Uzimajući u obzir odredbu člana 53. i člana 64. Bečke konvencije o ugovornom pravu, kogentna norma može se definisati kao norma opšteg međunarodnog prava koja se nikada ne može derogirati i koja je kao takva prihvaćena i prepoznata od strane međunarodne zajednice u celini. Stoga je posebno naglašen značaj razlikovanja apsolutnih ljudskih prava od *jus cogens* normi, uz razjašnjenje da su pojedina apsolutna prava ujedno i *jus cogens* norme, dok onima koja to još uvek nisu, pripada najviše mesto unutar interne hijerarhije ljudskih prava konkretnog pravnog sistema.

Disertacija je pokazala i da apsolutna ljudska prava idu korak dalje u odnosu sa peremptorne norme, jer se njihov viši status zapravo i operacionalizuje u okviru sudskog postupka. Naime, isključivanjem uobičajenih mehanizama ograničenja, odnosno, jednom rečju, analize proporcionalnosti, pristup sudova apsolutnim pravima je drugačiji u smislu načina njihovog rezonovanja i obrazloženja presuda. U tom svetlu, zaključeno je da apsolutna ljudska prava odražavaju tendenciju konstitucionalizacije međunarodnog pravnog poretka, jer postavljaju jasne granice koje unose strukturu u institucionalno ponašanje u situacijama kada je pritisak i težnja ka zloupotrebama najveća.

Dodatno, *jus cogens* norme su tradicionalno kritikovane zbog činjenice da su do sada retko vodile konkretnim implikacijama u praksi. U jurisprudenciji međunarodnih sudova, one su se obično invocirale samo da bi se pojačala moralna snaga određenih argumenata, što im je uglavnom davalo samo deklarativni karakter, umesto da se primenjuju u kontekstu ništavosti međunarodnih ugovora ili za rešavanje sukoba normi. Drugim rečima, one gotovo nikada nisu bile *ratio decidendi* presuda međunarodnih sudova. Iako se ovo ne može u potpunosti reći za apsolutna prava, budući da su, kao što je u disertaciji i pokazano, ona do sada imala širi uticaj na sudsku praksu i rezonovanje, ipak postoji prostor za bolju strukturu i jasniji okvir u razumevanju apsolutnih prava. Preciznost i transparentnost u sudijskom pristupu bi povećala pravnu sigurnost i ojačala zaštitu koju bi ova prava trebalo da uživaju.

Na samom kraju, poslednje poglavlje disertacije obradilo je i pojam *erga omnes* obaveza, koje su, kao i *jus cogens* norme, univerzalno obavezujuće i štite fundamentalne vrednosti, ali za razliku od potonjih, nemaju karakter nederogabilnosti. Stoga je istaknut predlog da se one smatraju „*jus cogens in statu nascendi*“ normama, te da u okvirima međunarodnog pravnog normativne hijerarhije njihov položaj bude između imperativnih normi, koje zauzimaju najviši nivo, i dispozitivnih normi, koje su na samom dnu lestvice. Istaknuto je i da praktično ne postoji veza između *erga omnes* obaveza i apsolutnih prava, jer kada su prava apsolutna samo u okviru određenog režima ljudskih prava, ona nemaju *erga omnes* dejstvo, dok u situacijama kada se smatraju apsolutnim u svim sistemima ljudskih prava, ona već ispunjavaju uslove za kogentni status. Ukratko, shvaćena na način predložen u ovoj disertaciji, apsolutna ljudska prava nalaze svoje mesto na vrhu interne hijerarhije ljudskih prava i predstavljaju najbližu kategoriju *jus cogens* normama, jer diktiraju koja će prava dosegnuti takav nivo imperativnosti, imajući u vidu da prava koja su prepoznata kao apsolutna u svim regionalnim sistemima ljudskih prava očigledno imaju i peremptorni status.

Naučni doprinos istraživanja

Imajući u vidu da je pojam apsolutnih ljudskih prava prisutan u većini stranih i domaćih udžbenika iz oblasti međunarodnog prava ljudskih prava, a da su, paradoksalno, njegovo precizno značenje i sadržina nejasni, kao i da su izvori posvećeni njegovom razjašnjenju, naročito u domenu prava, malobrojni, glavni doprinos koji ova disertacija pretenduje da postigne jeste upravo konceptualizacija ovog pojma.

Nedostatak istraživanja posvećenih ovoj temi nije bez objašnjenja. Naime, kategorija apsolutnih ljudskih prava nužno implicira postojanje hijerarhije ne samo među normama međunarodnog prava u širem smislu, već i unutar međunarodnog prava ljudskih prava. Ta je teza, pak, veoma sporna. Još od usvajanja Univerzalne deklaracije o ljudskim pravima, isticane su određene karakteristike ljudskih prava, kao što su inherentnost, neotuđivost, univerzalnost, nedeljivost i međuzavisnost. Drugim rečima, radi se o pravima koja svaki

pojedinaac poseduje od momenta rođenja, zato što je ljudsko biće, nezavisno od garancija države, koja ih nikada ne može oduzeti ili poreći, odnosno o pravima koja se primenjuju nezavisno od bilo koje lične karakteristike pojedinca i pravima koja su nedeljiva i međuzavisna, što podrazumeva da uživanje i ostvarenje jednog ljudskog prava zavisi od poštovanja svih ostalih ljudskih prava. I upravo tu leži tenzija koja u stopu prati koncept apsolutnih ljudskih prava, to jest, koja prati (i potencijalno obeshrabruje) pokušaje uspostavljanja hijerarhije među ljudskim pravima. Kako je moguće da određena ljudska prava budu superiorna, nadređena u odnosu na druga ljudska prava, ako su ona međuzavisna?

Na ovom mestu trebalo bi napomenuti da nijedan međunarodni dokument ne spominje izričito ove osobine ljudskih prava. U preambulama analiziranih dokumenata priznato je urođeno dostojanstvo i jednakost i neotuđivost ljudskih prava svih ljudskih bića, dok su ostali principi izvedeni različitim oblicima tumačenja. Međutim, ima autora koji smatraju da su ova načela razvijena sa posebnim ciljem, da neutrališu neujednačenost koja postoji među pravima, neujednačenost koja je dovela do dominacije prve generacije ljudskih prava na uštrb ekonomskih, socijalnih i kulturnih prava, pogotovo ako se uzme u obzir da petina svetske populacije nema zadovoljene osnovne ljudske potrebe, poput vode ili hrane.

Međutim, u fokusu ove disertacije su pravni aspekti ljudskih prava, te koncept koji je u njoj razvijen ima potencijal da reši postavljenu dilemu. Razlikovanje između nederogabilnih prava i prava koja se mogu derogirati samo je jedan od indikatora postojanja hijerarhije među ljudskim pravima. Upravo usled ove identifikovane kontradiktornosti koja obeležava suštinu međunarodnog prava ljudskih prava, prepoznata je potreba za izradom sveobuhvatnog rada koji će dokazati da je hijerarhija među ljudskim pravima prisutna i u teoriji i u praksi, ali i pružiti konceptualizaciju pojma i pronaći sadržinu apsolutnih ljudskih prava, koja čvrsto stoje na najvišoj lestvici unutar te hijerarhije.

Na ovaj način, rad teži da popuni prazninu koja je uočena kako u doktrini međunarodnog prava, tako i u praksi različitih međunarodnih sudova i kvazisudskih tela. Razjašnjenjem značenja ovog koncepta, stvara se i mogućnost za jednoobraznu invokaciju i primenu apsolutnih ljudskih prava i od strane pravnika teoretičara i od strane pravnika praktičara.

Štaviše, kako bi se pronašao odgovor na pitanje šta apsolutna ljudska prava zapravo znače, neophodno je analizirati i ograničenja ljudskih prava, čija sistematizacija je ne samo veoma značajna, već i neophodna, s obzirom na to da se radi o centralnom aspektu međunarodnog prava ljudskih prava kome nije posvećeno dovoljno pažnje u teoriji.

U tom smislu, disertacija može da doprinese opštem diskursu ljudskih prava na nekoliko načina. Kroz predstavljanje tipologije ograničenja ljudskih prava sa jasno razgraničenim vrstama i kriterijumima, ona pruža operativni okvir za procenu stepena uživanja ljudskih prava, koji smanjuje prostor za terminološke nedoslednosti i interpretativne dvosmislenosti koje su do sada bile rasprostranjene u literaturi i praksi.

Shodno tome, konceptualizovanjem pravne, a ne samo deklarativne definicije, apsolutna ljudska prava ulaze u okvir koji može biti veoma koristan u strukturisanom i doslednom rezonovanju sa predvidljivim ishodima. Lista prava koja se mogu smatrati apsolutnim prema predloženoj definiciji, zajedno sa objašnjenjem zašto pojedina prava, za koja se često tvrdi da su apsolutna, zapravo ne ispunjavaju uslove za taj status, može poslužiti kao inspiracija za dalji razvoj ne samo ove teme, već i materije imperativnih normi međunarodnog javnog prava. Drugim rečima, identifikacijom prava koja veći deo međunarodne zajednice smatra apsolutnim zapravo je ukazano na to koje su sve norme iz

oblasti međunarodnog prava ljudskih prava stekle kogentni karakter. U disertaciji je podvučeno i da je zamislivo da prava identifikovana kao apsolutna jednog dana prestanu da imaju taj status, te da je teorijski okvir predstavljen u ovom radu opšte prirode i stoga ostavlja prostor i za takav (nepovoljan) ishod.

Moguća dodatna vrednost ove analize je u prikazu hijerarhijske strukture unutar međunarodnog prava ljudskih prava, kao i u jasnoj diferencijaciji između apsolutnih ljudskih prava, *jus cogens* normi i *erga omnes* obaveza, čime se u stvari, osim apsolutnih ljudskih prava, kristalizuju i srodni, često konfuzni, koncepti.

Konačno, vreme objavljivanja ovog rada nije beznačajno, posebno imajući u vidu rastuće neizvesnosti sa kojima se suočava savremena međunarodna zajednica, koja se još uvek bori sa posledicama pandemije, dok se istovremeno suočava sa više oružanih sukoba, autokratskim režimima i krahom demokratije i vladavine prava u razvijenim zemljama. U periodu takve nestabilnosti države su posebno sklone davanju prioriteta nacionalnoj bezbednosti i drugim partikularnim interesima na račun osnovnih vrednosti koje čine suštinu (apsolutnih) ljudskih prava. Pa ipak, ako apsolutna prava uopšte nešto znače, onda je njihova relevantnost kontinuirana, jer u suprotnom ne bi ni postojala, niti bi mogla da ispune svoju svrhu. Ipak, nekako se čini da je njihova afirmacija u ovom trenutku potrebnija nego ikad.

Naposletku, sve i da ponuđena teorija o apsolutnim ljudskim pravima ne bude prihvaćena, ona može inspirisati druge teoretičare da sagledaju međunarodno pravo kroz prizmu apsolutnih ljudskih prava. A takva reakcija bi zapravo značila razvoj i napredak međunarodnog prava ljudskih prava.

Annex 2 – Author's Biography

Ana Zdravković was born in 1993 in Zemun, where she completed her primary education at Svetozar Miletić Elementary School as a recipient of the *Vuk Karadžić* award for outstanding achievement, after which she graduated from natural sciences program at the *Mihailo Petrović Alas* Ninth Grammar School.

In 2012, she enrolled at the Faculty of Law, University of Belgrade, where she earned her Bachelor's degree in 2016 with an average grade of 9.1/10. She completed her Master's studies at the same faculty in 2017 with a maximum GPA of 10/10, defending her thesis on *The Prohibition of Ne Bis In Idem in the Case Law of the European Court of Human Rights, with Special Emphasis on the Milenković v. Serbia*, before Prof. Ivana Krstić, PhD and Prof. Bojana Čučković, PhD. During her studies, she was awarded several scholarships supporting her academic development and postgraduate education.

She has further advanced her expertise through participation in numerous courses and seminars in Serbia and abroad. She is the author of number of academic papers, which were presented at academic conferences, and has contributed to the editing of collective volumes published by domestic and international publishers. Since graduating, she has been engaged in the implementation of numerous academic and professional projects, including the Horizon project *Advancing Cooperation on the Foundations of Law – ALF* (No. 101079177), which is financed by the European Union and coordinated by the Center for Legal Fundamentals of the University of Belgrade Faculty of Law.

In the 2018/19 and 2019/20 academic years, she served as a Teaching Assistant at the University of Belgrade Faculty of Law, assisting in the course on Public International Law. She completed her legal traineeship at the Law Office of Nebojša D. Maraš and passed the Bar Exam in June 2021 with highest distinction.

Since 2022, she has been employed at the Institute of Comparative Law in Belgrade, where she holds the position of Research Assistant.

She is fluent in English and German and has intermediate knowledge of Italian.

Prilog 2 – Biografija autorke

Ana Zdravković rođena je 1993. godine u Zemunu, gde je kao nosilac diplome „Vuk Karadžić“ završila osnovnu školu „Svetozar Miletić“. Sve četiri godine na prirodno-matematičkom smeru u IX gimnaziji „Mihailo Petrović Alas“ završila je sa odličnim uspehom. Pravni fakultet Univerziteta u Beogradu upisala je 2012. godine, a završila 2016. godine, sa prosečnom ocenom 9,1. Poslediplomske master studije na istom fakultetu završila je 2017. godine, sa prosečnom ocenom 10, odbranivši master rad na temu „Zabrana vođenja novog postupka povodom iste stvari u praksi Evropskog suda za ljudska prava sa posebnim osvrtom na slučaj *Milenković protiv Srbije*“ pred komisijom u sastavu prof. dr Ivana Krstić i prof. dr Bojana Čučković. Iste godine upisala je doktorske akademske studije na Pravnom fakultetu Univerziteta u Beogradu, na kojima je sve ispite položila sa ocenom 10,00. Za vreme studija, bila je dobitnica različitih stipendija, koje su joj omogućile stručno usavršavanje i nastavak školovanja.

Tokom osnovnih i poslediplomskih akademskih studija nastavila je svoje usavršavanje učešćem u kursevima i seminarima u zemlji i inostranstvu. Autorka je većeg broja naučnih radova, čije rezultate je izlagala na naučnim konferencijama, a učestvovala je i u uređivanju zbornika radova, objavljenih od strane domaćih i međunarodnih izdavača. Od završetka osnovnih studija, angažovana je u implementaciji mnogobrojnih naučnih i stručnih projekata, od kojih posebno izdvaja Horizont projekat „*Advancing Cooperation on The Foundations of Law – ALF*“ (br. 101079177), koji sprovodi Centar za temeljna pravna znanja Pravnog fakulteta Univerziteta u Beogradu.

Akadske 2018/19, kao i 2019/20 godine bila je angažovana kao saradnik van radnog odnosa na Pravnom fakultetu Univerziteta u Beogradu radi pomaganja u izvođenju nastave na predmetu Međunarodno javno pravo.

Pripravnički staž obavila je u advokatskoj kancelariji Nebojše D. Maraša, a pravosudni ispit položila je 2021. godine sa najvećim brojem odlika u junskom ispitnom roku.

Od 2022. godine zaposlena je na Institutu za uporedno pravo u Beogradu, gde je izabrana u zvanje istraživača saradnika.

Govori engleski i nemački jezik, a služi se i italijanskim jezikom.

List of Publications - Spisak naučnih radova

1. „Poglavlje VI – Istraga, sudski postupak, proceduralno pravo i zaštitne mere”, *Komentar Konvencije Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici* (ur. Ivana Krstić, Bojana Čučković), Pravni fakultet Univerziteta u Beogradu, 2025 (u štampi)
2. “Access to Justice and Enforcement of Rights – An Introduction”, *e Publica – Public Law Journal*, 12(2), 2025, 1-8 (u koautorstvu sa Milom Đorđević i Savom Vojnovićem)
3. *Polazne osnove za usvajanje Zakona o pravosudnoj akademiji*, Centar za pravosudna istraživanja, 2025 (u koautorstvu sa Vidom Petrović Škero i prof. dr Goranom Ilićem);
4. “Absolute Human Rights”, *Foundations of Law* (FOLBlog), 2025/6/3, <https://fol.ius.bg.ac.rs/2025/06/03/absolute-human-rights/>;
5. “Reassessing Feminist Legal Theories: Introduction”, *Reassessing Feminist Legal Theories* (eds. Nicola Lacey *et al.*), Springer, 2024, 1-9 (u koautorstvu sa Miodragom Jovanovićem);
6. “Breaking the Invisible Cage: Limits of Law in Structural Discrimination”, *Diritto, Immigrazione e Cittadinanza*, Fascicolo No. 3, 2024, 1-18 (u koautorstvu sa Milicom Matijević);
7. “Use of Minority Languages in Administrative Proceedings in Serbia”, *Law on General Administrative Procedure: Contemporary Tendencies and Challenges*, Eurosfera & Partners, Institut za uporedno pravo, 2024, 335-348 (u koautorstvu sa Milicom Matijević);
8. “How It All Began - Exploring The Theoretical Conceptualisations of Absolute Rights”, *Revista de Estudios Judiciales*, No. 8, 2024, 5-47;
9. „Uloga Istanbulske konvencije u tumačenju odredbe člana 3. Evropske konvencije o ljudskim pravima”, *Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici - deset godina primene* (ur. Ivana Krstić), Pravni fakultet Univerziteta u Beogradu, 2024, 77-97;
10. “European Court of Human Rights: Autonomous Legal Concepts”, *Encyclopedia of the Philosophy of Law and Social Philosophy* (eds. M. Sellers, S. Kirste), Springer, 2023, (u koautorstvu sa Dragoljubom Popovićem);
11. „Pravo na besplatno osnovno obrazovanje – od ideala do stvarnosti”, *Strani pravni život* 67(2), Institut za uporedno pravo, 2023, 271-298 (u koautorstvu sa Aleksandrom A. Begović);
12. “Krstić, Ivana, Marco Evola, Maria Isabel Ribes Moreno (eds). 2023. Legal Issues of International Law from a Gender Perspective. Cham: Springer, 224.”, *Anali Pravnog fakulteta u Beogradu* 71(3), 2023, 617-630;
13. “Some Reflections on the Non-Derogable Character of Freedom of Thought, Conscious and Religion and the Concept of Absolute Human Rights”, *Savremeno državno-crkveno pravo*, Institut za uporedno pravo, 2023, 743-771 (u koautorstvu sa Milicom Matijević);

14. *Ima li pravde za slobodu izražavanja? – Treći izveštaj o zaštiti slobode izražavanja u pravosudnom sistemu Srbije*, Fondacija Slavko Ćuruvija, 2023 (u koautorstvu sa Vidom Petrović Škero, Natašom Jovanović i Krunom Savović);
15. *Priručnik za novinare o SLAPP tužbama*, Fondacija Slavko Ćuruvija, 2023;
16. *Sloboda izražavanja pred sudom – Drugi redovni izveštaj o zaštiti slobode izražavanja u pravosudnom sistemu Srbije*, Fondacija Slavko Ćuruvija i Centar za pravosudna istraživanja, 2022 (u koautorstvu sa Vidom Petrović Škero, Natašom Jovanović i Krunom Savović);
17. *Polazne osnove za usvajanje Zakona o uređenju sudova*, Centar za pravosudna istraživanja, 2022 (u koautorstvu sa Vidom Petrović Škero i Gordanom Mihailović);
18. „Zbornik „Human Rights in the 21st Century” – Svedočanstvo stanja ljudskih prava neposredno pre pandemije”, *Godišnjak Tribine Biblioteke SANU*, 2022, 231-236;
19. „SLAPP tužbe – zloupotreba prava na sudsku zaštitu u službi ograničavanja slobode izražavanja”, *Strani pravni život* 6(1), Institut za uporedno pravo, 2023, 75-96;
20. „Obligations Erga Omnes – Jus Cogens in Statu Nascendi? – A Theory Inspired by ‘The Nature of International Law’”, *Pravni zapisi*, 2/2021, 577-594;
21. „The Affair of ‘State of Emergency’ – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID-19 Crisis?”, *Iustinianus Primus Law Review*, Vol. 11, 2021, 1-12;
22. „Međunarodni sud pravde – vladalac ili mislilac?”, *Sudstvo kao vlast* (ur. Miodrag Jovanović, Ana Zdravković), Centar za pravosudna istraživanja, 2020, 155-174;
23. „Few Questions Yet to Be Answered in Regard To Article 7 of the European Convention on Human Rights”, *EU and Comparative law Issues and Challenges Series – ECLIC*, Vol. 4, 2020, 670-700;
24. „Finding the Core of International Law – Jus Cogens in the Work of International Law Commission”, *SEE EU Cluster of Excellence in European and International Law, Series of Papers*, Vol. 5, Europa Institut, University of Saarbrücken, 2020, 141-158;
25. „Pravo na život sagledano kroz prizmu apsolutnih ljudskih prava”, *Pravni život*, broj 12, tom IV, 2019, 337-355;
26. „Međunarodni status ekoloških migranata”, *Zbornik Pravnog fakulteta Univerziteta u Beogradu „Identitetski preobražaj Srbije”* (ur. Ivana Krstić, Maja Lukić), Pravni fakultet Univerziteta u Beogradu, 2019, 403-419;
27. „Međunarodno pravo u važećem Ustavu i amandmanima na Ustav Republike Srbije iz 2018. godine – izvitopereni monizam?”, *Evropkso zakonodavstvo*, Institut za međunarodnu politiku i privredu, broj 69, 2019, 33-53;

28. „Zabrana vođenja novog postupka povodom iste stvari u praksi Evropskog suda za ljudska prava sa posebnim osvrtom na slučaj *Milenković protiv Srbije*“, *Revija za pravnu, političku i socijalnu teoriju i filozofiju – Eudaimonia*, 2021, broj 6, 53–92.

Annex 3 - Accompanying Declarations in Serbian language
(Prilog 3 - Prateće izjave na srpskom jeziku)

1. Izjava o autorstvu

Ime i prezime autora: Ana Zdravković

Broj indeksa: DS 14/2017

Izjavljujem

da je doktorska disertacija pod naslovom „ABSOLUTE HUMAN RIGHTS“ („APSOLUTNA LJUDSKA PRAVA“)

- rezultat sopstvenog istraživačkog rada;
- da disertacija u celini ni u delovima nije bila predložena za sticanje druge diplome prema studijskim programima drugih visokoškolskih ustanova;
- da su rezultati korektno navedeni i
- da nisam kršila autorska prava i koristila intelektualnu svojinu drugih lica.

Potpis autora

U Beogradu, _____

2. Izjava o istovetnosti štampane i elektronske verzije doktorskog rada

Ime i prezime autora: Ana Zdravković

Broj indeksa: DS 14/2017

Studijski program: Međunarodnopravna uža oblast

Naslov rada: „ABSOLUTE HUMAN RIGHTS“ („APSOLUTNA LJUDSKA PRAVA“)

Mentor: Prof. dr Bojana Čučković

Izjavljujem da je štampana verzija mog doktorskog rada istovetna elektronskoj verziji koju sam predala radi pohranjivanja **u Digitalnom repozitorijumu Univerziteta u Beogradu.**

Dozvoljavam da se objave moji lični podaci vezani za dobijanje akademskog naziva doktora nauka, kao što su ime i prezime, godina i mesto rođenja i datum odbrane rada.

Ovi lični podaci mogu se objaviti na mrežnim stranicama digitalne biblioteke, u elektronskom katalogu i u publikacijama Univerziteta u Beogradu.

Potpis autora

U Beogradu, _____

3. Izjava o korišćenju

Ovlašćujem Univerzitetsku biblioteku „Svetozar Marković“ da u Digitalni repozitorijum Univerziteta u Beogradu unese moju doktorsku disertaciju pod naslovom:

“ABSOLUTE HUMAN RIGHTS“ („APSOLUTNA LJUDSKA PRAVA“)

koja je moje autorsko delo.

Disertaciju sa svim priložima predala sam u elektronskom formatu pogodnom za trajno arhiviranje.

Moju doktorsku disertaciju pohranjenu u Digitalnom repozitorijumu Univerziteta u Beogradu i dostupnu u otvorenom pristupu mogu da koriste svi koji poštuju odredbe sadržane u odabranom tipu licence Kreativne zajednice (Creative Commons) za koju sam se odlučila.

1. Autorstvo (CC BY)
2. Autorstvo – nekomercijalno (CC BY-NC)
- ☒ 3. Autorstvo – nekomercijalno – bez prerada (CC BY-NC-ND)
4. Autorstvo – nekomercijalno – deliti pod istim uslovima (CC BY-NC-SA)
5. Autorstvo – bez prerada (CC BY-ND)
6. Autorstvo – deliti pod istim uslovima (CC BY-SA)

(Molimo da zaokružite samo jednu od šest ponuđenih licenci. Kratak opis licenci je sastavni deo ove izjave).

Potpis autora

U Beogradu, _____
