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Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's discourse on the justified use of force

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This article discusses the discourse on the justified use of force in the Strasbourg Court's analysis of Article 3. With particular focus on the judgment in *Güler and Öngel v Turkey*, a case concerning the use of force by State agents against demonstrators, it addresses the question of the implications of such discourse, found in this and other cases, on the absolute nature of Article 3. It offers a perspective which suggests that the discourse on the justified use of force can be reconciled with Article 3's absolute nature.

INTRODUCTION

The case of *Güler and Öngel v Turkey*[1] has gone largely unobserved by commentators. Yet not only does it establish important duties on States to regulate the policing of protests and demonstrations, it also raises interesting and significant questions regarding the relationship between the definition of the right contained in Article 3 of the European Convention on Human Rights ('ECHR') and the right's absolute nature.

It is generally recognised that the absolute nature of Article 3 ECHR lies in three key elements: it admits of no qualifications or exceptions; it cannot be subject to derogation under Article 15 ECHR; and it applies to everyone no matter what.[2] Concluding its findings by establishing that the force used by police against protesters during a demonstration in Turkey was 'excessive'[3] and as a result not 'justified'[4] and thus a violation of Article 3, the Second Section of the European Court of Human Rights ('ECtHR') brings a number of questions surrounding Article 3's alleged absoluteness to the surface.

Is there room for considerations of justifiability and of proportionality or excess within Article 3? How do such considerations, which tend to feature in the application of qualified and derogable rights, challenge the absolute nature of Article 3? Is there any way to reconcile the two? This article outlines the facts and key aspects of the reasoning in the case before proceeding to highlight the questions that arise from this and similar cases. It then offers some tentative answers to these questions in light of the relevant cases, which may go some way towards rationalising the apparent discourse of qualification in the Court's reasoning.

BACKGROUND

*PhD Candidate, University of Cambridge (nm407@cam.ac.uk). I would like to thank Professor David Feldman for his invaluable help on my research and Dr Stephanie Palmer, Dr Roger O'Keefe and Colm O'Cinneide for sharing their thoughts with me on some of the issues covered in this article, as well my students at University College London and at the University of Cambridge for engaging with me and enlightening me with their ideas on this topic. The usual disclaimers apply.

[1] *Güler and Öngel v Turkey* App Nos 29612/05 and 30668/05, Judgment of 4 October 2011 (hereafter '*Güler*').
[2] See *Ireland v UK* (1979-80) 2 EHRR 25 at [163].
[3] *Güler* at [28].
[4] ibid at [29].

The applicants attended a demonstration in Istanbul organised by trade unions against the NATO summit being held there. A large group of police officers was deployed to police the demonstration. After a statement was read out, the demonstrators started to disperse but a small group attacked the police with sticks and stones. The police officers used tear gas and truncheons to disperse them. Six police officers were alleged to have been wounded at the incident.

The applicants were arrested during this incident and claimed that they were beaten during and after their arrest. A doctor examined them the following day and confirmed that they were unfit to work for seven days. Regarding both applicants, the doctor noted a number of bruises on many parts of the body, as well as a bleeding wound and a nose bleed on Mr Öngel.

The applicants sought the prosecution of the police officers who had carried out their arrest, alleging that it had been unlawful and that excessive force had been used. The prosecutor issued a decision of non-prosecution, asserting that the force used by the security forces had been lawful, as it had not been excessive and the injuries sustained by the applicants were the result of a proportionate use of force, considering that a group of 70 people had at the time attacked the police and caused damage to nearby shops and vehicles. The applicants' objections to the decision were dismissed by the relevant domestic court.

In a criminal trial, the domestic criminal court acquitted the applicants of charges of not dispersing despite the police officers' warning. It found that they were not amongst the demonstrators who had attacked the police officers, stating that there was no evidence that they had resisted the police officers as alleged.

The applicants brought a case to the ECtHR, claiming that there had been a violation of Article 3 of the Convention on account of police brutality that caused them physical suffering. They maintained that, after the protest statement had been read, the police had used excessive force to disperse the demonstrators. The Government of Turkey argued that the force used by the police against the applicants had been necessary and proportionate.

Before assessing the merits of the case, the Court reiterated:

> Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and victim's behaviour.[5]

It noted that the ill-treatment must attain a minimum level of severity to reach the Article 3 threshold. It also stated that, although the standard of proof of 'beyond reasonable doubt' generally applied on Article 3 cases, 'such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.[6] This approach was coupled with the idea that the Court must apply a 'particularly thorough scrutiny' on Article 2 and 3 allegations.[7]

The Court accepted that, on the evidence, the applicants' injuries were sustained at the hands of the police during the demonstration and that the injuries were of sufficient severity to bring the complaints within Article 3.[8] Yet it proceeded to highlight that 'Article 3 does

[5] ibid at [25].
[6] ibid at [26].
[7] ibid, citing *Saya v Turkey* App No 4327/02, Judgment of 7 October 2008 at [19].
[8] *Güler* at [27].

not prohibit the use of force in certain well-defined circumstances', but that 'such force may be used only if indispensable and must not be excessive'.[9]

The Court noted that the applicants were found by the domestic criminal court not to have been among those attacking the police. It observed that a large number of police officers equipped with helmets, gas masks and other equipment had been deployed to the area and thus that the security forces did not have to 'react without prior preparation'.[10] It also took into account the Government's failure to provide information showing that the police force intervention 'was properly regulated and organised in such a way as to minimise to the greatest extent possible any risk of bodily harm to the demonstrators'.[11] It concluded that, although certain demonstrators had attacked the police, it could not be shown that the force used against the applicants, who were not amongst the attackers, was 'justified'.[12]

The Court therefore concluded that the injuries sustained were 'the result of treatment for which the State bears responsibility'[13] and that the applicants had been subjected to 'inhuman and degrading treatment'[14] in violation of Article 3.

ARTICLE 3 AND THE JUSTIFIABLE USE OF FORCE

The reasoning of the Court follows almost exactly the same pattern as in the case of *Saya v Turkey*,[15] a similarly under-discussed case, concerning the ill-treatment by police of a group of participants in May Day celebrations. This reasoning, conveyed in quite brisk style, is significant on two bases.

First, the Court follows a line of case law which has relaxed the evidential burden through a presumption that injuries surfacing on release from State custody were the result of proscribed ill-treatment for which State agents are responsible[16] with statements that affirm a similar attitude to alleged ill-treatment meted out by organised groups of police officers against persons involved in organised demonstrations. The approach is one whereby the finding of bruises on the applicants' bodies directly after the event in question shifts the burden on the Government to disprove responsibility.[17] This is significant in light of the difficulties for victims in establishing the facts in such a context, but also in light of the recognition of the position of control of State agents in such situations, a matter addressed further below.

The second element of significance surfaces in the Court's assessment of State responsibility. The Court approaches this matter as follows: first, it assesses whether the injuries sustained would, in principle, cross the Article 3 threshold of 'minimum level of severity'[18] and finds that they would, before moving on to assess the question whether the State is liable for it. The question here is not one of imputability or of responsibility to protect from acts of third parties. It is, according to the Court, one of *justifiability*.[19] The parameters of this question are set up in the Court's statement that Article 3 '*does not prohibit*' the use of

[9] ibid at [28], citing *Rehbock v. Slovenia* (1998) 26 EHRR CD120 at [66]-[78].
[10] *Güler* at [29].
[11] ibid.
[12] ibid.
[13] ibid at [30].
[14] ibid at [31].
[15] See n 7 above.
[16] See, among others, *Tomasi v France* (1993) 15 EHRR 1 at[108]-[111]; *Ribitsch v Austria* (1996) 21 EHRR 573 at [34]; *Aksoy v Turkey* (1997) 23 EHRR 553 at [61]; *Yavuz v Turkey* (2007) 45 EHRR 16 at [38]; *Diri v Turkey* (2010) 50 EHRR 1 at [35]-[39]; but cf *Klaas v Germany* (1994) 18 EHRR 305.
[17] Similar approaches are indicated in particular in *Gümüşsoy v. Turkey* App No 51143/07, Judgment of 11 October 2011, *Rehbock v Slovenia* (n 9 above) and *Saya v Turkey* (n 7 above).
[18] *Ireland v UK* (n 2 above) at [162]; *Pretty v UK* (2002) 35 EHRR 1 at [52].
[19] *Güler* at [29].

force in narrow, 'well-defined circumstances', insofar as the Government proves that such force is indispensable and not excessive.[20]

The ECtHR arguably gives itself too much credit in suggesting that the circumstances in which the use of force is *not* prohibited by Article 3 are well-defined. In *Shchukin v Cyprus*, the Court articulates one example of such circumstances, namely the use of force 'to effect an arrest',[21] citing a number of previous authorities.[22] Another line of case law identifies one other set of such circumstances as being medically necessary treatment.[23] Regarding the latter, the Court maintains that 'the manner in which the applicant is subjected to [the medically necessary measure] shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Art.3 of the Convention'.[24] The Court has also stated that a medical procedure, such as the taking of blood or saliva samples, performed in defiance of the will of the individual subjected to it for the purposes of obtaining evidence of his or her involvement in the commission of a criminal offence is not 'as such' prohibited by Article 3. Again, 'the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention'.[25]

It is unclear even in *Güler and Öngel v Turkey* precisely what 'well-defined circumstances' pertain to that particular situation and, although arrests were being effected, there appears to be a broader underlying set of circumstances at play here involving the use of force in defence of self or others from unlawful violence, which evokes the equivalent restriction to the right to life.[26] This is indicated by the Court's consideration of whether the applicants were amongst those attacking the police officers.[27]

The uncertainty is problematic. It can be argued that the Court offers insufficient guidance to potential victims or State authorities as to when force may be used without breaching Article 3 – this is a problem both from the perspective of the rule of law and in terms of the practical difficulties it poses to ensuring *ex ante* respect for the right. On the other hand, the Court's generally strict approach and reversal of the burden of proof could mean that, in practice, it encourages States to err on the side of respect for Article 3, by avoiding or minimising the use of force against individuals. This enhances Article 3's preventive function.[28]

Besides the uncertainty problems, however, the Court appears to be setting up a framework in which what *prima facie* amounts to Article 3 proscribed ill-treatment is then

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[20] ibid at [28]. This is the approach in *Rehbock v Slovenia* (a case cited by the Court, see n 9 above) at [72].

[21] *Shchukin and others v Cyprus* App No 14030/03, Judgment of 29 July 2010 at [93].

[22] See, among others, *Ivan Vasilev v Bulgaria* App No 48130/99, Judgment of 12 April 2007 at [63]; *Rehbock v. Slovenia* (n 9 above) at [68]-[78]; *Krastanov v Bulgaria* (2005) 41 EHRR 50 at [52]-[53]; and *Günaydın v Turkey* App No 27526/95, Judgment of 13 October 2005 at [30]-[32].

[23] See, for example, *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 at [94]; *Herczegfalvy v Austria* (1993) 15 EHRR 437 at [82]; *Naumenko v Ukraine* App No 42023/98, Judgment of 10 February 2004 at [112].

[24] *Nevmerzhitsky v Ukraine*, ibid at [94].

[25] See *Jalloh v Germany* (2007) 44 EHRR 32 at [67]-[74] (emphasis added).

[26] See European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Article 2(2)(a): '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…'

The Grand Chamber judgment in *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, containing strong dissenting judgments, reflects the issues surrounding the Court's current approach to this parameter of Article 2.

[27] *Güler* at [29].

[28] This is, to some extent, the view conveyed by Evans. See M.D. Evans, 'Getting to grips with torture' (2002) 51(2) ICLQ 365, 368.

subject to the question of justification and, if justified, is found *not* to amount to a violation of Article 3. This seems to cast the absoluteness discourse set out above into doubt.[29]

Indeed, the suggestion in an eminent textbook that 'there are recognized exceptions to the absolute nature of Article 3', with allusion to these being equivalent to the exceptions carved out in Article 2(2) ECHR,[30] arguably stems from this aspect of the Court's reasoning in cases like these. It would, perhaps, appear to some that the Court's discourse challenges each and every parameter of the three elements of absoluteness that it so constantly reiterates:

> The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 (2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.[31]

Within the space of five paragraphs, the Court goes from an assurance that Article 3 'prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and victim's behaviour'[32] to the thesis that, in certain circumstances, insofar as inflicted by force that is not excessive for the purpose pursued, the infliction of injuries *prima facie* within Article 3 may be justified. The Court thus might appear to open the window of qualification, equivalent to that applicable to 'qualified' Convention rights,[33] by carving out a rather *ill*-defined and open set of possible circumstances, in which 'indispensable' Article 3 ill-treatment is lawful. Moreover, although it does not enlarge the procedurally specific right to derogation encompassed in Article 15, it appears nonetheless to recognise the mini-emergency potential of certain situations creating the need for 'indispensable' uses of otherwise unacceptable violence. Lastly, it seems that the Court is very much concerned with the victim's behaviour in such circumstances, because it is that very behaviour that in turn determines whether the force used is necessary ('indispensable'), proportionate (not 'excessive') and therefore *justified*.[34]

How can this, if at all, be rationalised? It can arguably be rationalised by reconsidering the starting point. As regards the starting point, what we must contemplate is that Article 3 is not a prohibition on the use of force *per se*. Leaving to one side the positive obligations created by it, the negative obligation is to refrain from torture, inhuman or degrading treatment or punishment, not from 'physical violence' or 'causing actual bodily harm'.

This means that the definitional aspect of the right contained in Article 3, to which all individuals within ECHR jurisdiction are entitled to no matter what, is particularly complex – much more complex than, say, that in Article 2. The negative obligation pertaining to the

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[29] Scepticism on the interplay between the definition/interpretation of Article 3 and its allegedly absolute nature is conveyed in M. K. Addo and N. Grief, 'Does Article 3 Enshrine Absolute Rights?' (1998) 9 EJIL 510. See also H. Fenwick, *Civil Liberties and Human Rights*, 3rd edn (London: Cavendish Publishing, 2004) 44-45.

[30] D.J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 2009), 70.

[31] *Ireland v UK* (n 2 above) at [163].

[32] *Güler* at [25].

[33] See the juxtaposition between qualified and absolute rights in A. Ashworth, ''Security, Terrorism and the Value of Human Rights'', in Goold and Lazarus (eds), *Security and Human Rights* (Oxford: Hart, 2007), 212.

[34] Palmer attacks the importation of proportionality into a line of Article 3 case law in the UK. See S. Palmer, 'The Wrong Turning: Article 3 and Proportionality' (2006) 65(2) *Cambridge Law Journal* 438.

right to life is to refrain from taking away human life – although there are still grey areas,[35] this is largely straightforward. The narrow exceptions carved into Article 2 were inserted to allow for the exercise of force indispensable to the safety of others that can ultimately take away life.[36]

The same cannot be said of Article 3. Though there are no Article 2-styled exceptions carved out in the wording of Article 3, the very meaning of inhuman or degrading treatment or punishment or torture arguably admits of uses of force that would amount to the proscribed types of treatment in some circumstances but not in others. This is the import of the ECtHR's stipulation that Article 3 'does not prohibit' the use of force in certain circumstances. Although potentially simpler in its application and efficacious from a prevention-orientated perspective, the ECtHR's long-running case law in which any injury inflicted by State agents will tend to be considered a breach of Article 3 is what has brought about the need to carve out so-called exceptions to this seeming norm. Instead, what the ECtHR is doing is drawing the boundaries between inhuman or degrading treatment and treatment that cannot be considered such.[37] On this account, the argument in *Harris, O'Boyle and Warbrick* that there are exceptions to the absolute nature of Article 3 because '[i]f the taking of life by the state is not contrary to Article 2 of the Convention in certain circumstances (eg, on grounds of self-defence), "it must follow a fortiori that severe wounding is in such circumstances justifiable"' is misplaced.[38]

How are these boundaries drawn? This rests on the meaning of the Article 3 proscribed treatment. Article 3 can be said to encompass five distinct types of ill-treatment (torture; inhuman treatment; degrading treatment; inhuman punishment; and degrading punishment), yet the key thresholds are arguably two: the threshold separating Article 3 types of ill-treatment from treatment that falls outside the prohibition in Article 3 and the threshold separating torture from other types of Article 3 treatment. The latter threshold and its implications form a complex and interesting issue but the threshold that is crucial in addressing the question of what Article 3 'does not prohibit' is the threshold separating Article 3 ill-treatment from treatment falling outside Article 3.

There seems to be an overarching criterion to this threshold, as highlighted in *Ireland v UK*: 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.[39] According to *Pretty v UK*, inhuman treatment consists of '"ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering'.[40] Treatment is degrading for the purposes of Article 3 when it is 'such as to arouse in…victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.[41] The 'minimum level of severity' test is super-imposed to the latter criteria too, as indicated in *Campbell and Cosans v UK*, where the threshold identified is of 'humiliation or debasement attaining a minimum level of severity'.[42] Indeed, as set out above, it seems that this test is super-imposed

[35] See D. Korff, *The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights* (Council of Europe, 2006), 6-15.
[36] See Article 2(2) ECHR.
[37] Waldron critiques the lack of critical scholarship on this question. See J. Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: OUP, 2012), 289.
[38] *Harris, O'Boyle & Warbrick*, n 30 above, 70.
[39] *Ireland v UK* (n 2 above) at [162].
[40] *Pretty v UK* (2002) 35 EHRR 1 at [52].
[41] *Ireland v UK* (n 2 above) at [167].
[42] *Campbell and Cosans v UK* (1982) 4 EHRR 293 at [28]; see also *Costello-Roberts v UK* (1995) 19 EHRR 112 at [30]-[32]. But cf. Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR', (2003) 21 *Netherlands Quarterly of Human Rights* 385 at 420-421. See also *Tyrer v UK* (1979-80) 2 EHRR 1 at [29].

even to the circumstances that the Court identifies in which the use of force is not prohibited by Article 3.[43]

Much thus seems to hinge on the 'minimum level of severity' question. Its meaning therefore has to be unpacked. A primary issue is what it precisely refers to. It appears to refer to the severity of the treatment (or punishment). In that sense, the 'minimum level of severity' criterion seems to pertain both to the gravity of the conduct of the perpetrator(s) and to the suffering or debasement caused to the victim. It can thus be said to be both agent-focused and victim-focused.[44] Yet although the question of the degree of suffering of the victim appears to be a quantitative one[45] – though certainly not a straightforward one[46] – this is not necessarily true of the question as to the severity of the conduct at issue. Rather, the latter brings to the surface both qualitative and quantitative concerns that underpin the Court's reasoning in cases like the one under consideration.

On point, in *Muradova v Azerbaijan*,[47] the Court follows its statement as to Article 3 not prohibiting the use of indispensable force in well-defined circumstances, by the following point: 'Recourse to physical force which has not been made strictly necessary by a person's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.'[48] In a similar vein, Waldron has claimed that the prohibition on torture reflects the rejection of brutality in US law, explaining that '[i]f law is forceful or coercive, it gets its way by non-brutal methods which respect rather than mutilate the dignity and agency of those who are its subjects'[49] and confirms that this is applicable to the prohibition of cruel, inhuman and degrading treatment and punishment also.[50]

Dignity and agency thus appear to be key values underpinning the qualitative element in the Article 3 threshold.[51] Yet what does respect for the dignity and agency of the human mean? A value underpinning the post-WWII human rights agenda,[52] dignity is an evaluative standard that is viewed as extremely hard to unravel[53] and that can admit of a variety of interpretations and implications.[54] It appears to signify the right of all human beings to – borrowing from the wording of the Article 3 test – a minimum level of respect.[55] Arguably,

[43] See discussion of *Nevmerzhitsky v Ukraine* and *Jalloh v Germany* (n 23 and n 25) above.
[44] See n 37 above, ch 9.
[45] See critique by Waldron – ibid, 284.
[46] The difficulties in the evaluation of suffering in the context of defining torture are addressed in M. McDonnell, L. Nordgren and G.F. Loewenstein, 'Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy' (2011) 44 (1) *Vanderbilt Journal of Transnational Law* 87.
[47] *Muradova v Azerbaijan* (2011) 52 EHRR 41.
[48] ibid at [109]. Previous cases made this point only in relation to 'a person deprived of his liberty' – see, for instance, *Ribitsch v Austria* (n 16 above) at [38].
[49] J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House', (2005) 105(6) *Columbia Law Review* 1681, 1726-1727. See also D. Sussman, 'What's Wrong with Torture?' (2005) 33(1) *Philosophy and Public Affairs* 1.
[50] J. Waldron, 'Cruel, Inhuman, and Degrading Treatment: The Words Themselves' (November 2008). NYU School of Law, Public Law Research Paper No 08-36, 28 (footnote). Available at http://dx.doi.org/10.2139/ssrn.1278604 (last visited 29 July 2012).
[51] For references to dignity in Article 3 case law, see n 48 above and also, among others, *Keenan v UK* (2001) 33 EHRR 38 at [113]; *Tyrer v UK* (n 42 above) at [33].
[52] See, for instance, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1.
[53] See C. McCrudden, 'Human dignity and judicial interpretation of human rights', (2008) 19(4) EJIL 655-724.
[54] See D. Feldman, 'Human Dignity as a Legal Value' Part 1 (1999) PL 682; David Feldman, 'Human Dignity as a Legal Value' Part 2 (2000) P.L. 61; C. Dupré, 'Unlocking human dignity: towards a theory for the 21st century', 2 (2009) EHRLR 190; C. Dupré, 'La dignité dans l'Europe constitutionnelle: entre inflation et contradictions', in J. Ziller (ed.), *L'européanisation des droits constitutionnels à la lumière de la constitution pour l'Europe*, (Paris: L'Harmattan, 2003), 121-135.
[55] In *Raninen v Finland* (1998) 26 EHRR 563 at [55] the Court refers to 'lack of respect for the applicant as a person' as a criterion for crossing the Article 3 threshold.

respect is called for towards our mutual humanity, part of our humanity being human agency, that is, the capacity for human beings to make choices and enact these choices.[56]

Drawing from Waldron's similar assertions regarding the difficulty in interpreting words such as 'cruel', 'inhuman' and 'degrading', it can be seen that these are contestable, evaluative standards which we must nonetheless do our best to interpret.[57] Unfortunately, a full endeavour to interpret what is meant by respect for dignity or agency or by the words 'inhuman' or 'degrading' is not possible within this short piece, yet acknowledging their relevance and providing an indication of their significance in the context of the cases addressed here will help rationalise what initially appears to be a language of exception within Article 3.

Going back to the Court's statement in *Muradova v Azerbaijan*,[58] it could be argued that, in contrast to the situation evoked by the Court, force used against an individual that is immediately necessitated by the individual's actions can be viewed as treatment which, despite its potential to create physical and/or mental suffering, does not fall within the categories of inhuman or degrading treatment or torture. This is because the dignity of the individual subjected to force is respected. On this account, the proportionality analysis that the Court uses here is a means of respecting human agency, in that it sets up the idea of a reaction directly targeted to averting the threat of harm created by the action of the agent and no more. Such concerns seem also broadly to underpin the Bundesverfassungsgericht's distinction, in the German Aviation Act judgment of 2006, between shooting down a plane containing only terrorists and shooting down a hijacked plane containing innocent passengers, finding that the right to dignity would only be violated in the latter case.[59] The Bundesverfassungsgericht's comments that such action against innocent passengers disrespects them as subjects with dignity and inalienable rights[60] while a similar action against only terrorist attackers could be said to be brought about directly by their action and therefore not to be disrespectful of their dignity[61] reflect the distinction drawn here.

Thus neither the use of force nor the infliction of suffering can be the be-all and end-all of concepts such as 'inhuman treatment'. Shooting someone in the leg certainly causes a great deal of physical and probably mental suffering. Shooting someone in the leg when he or she is strapped onto a chair, leaving him or her to suffer in the pain of the wound and the anguish of not knowing if medical assistance will be provided, for the purpose of obtaining some information from him or her, would probably be considered by the Court to fall within the definition of torture.[62] The shooting of a prisoner in the leg by a prison officer who is simply feeling brutal and does not like the look of the particular prisoner will, at the least, be seen to amount to inhuman treatment. Yet if a police officer took the shot as the minimum measure necessary to incapacitate a person who is in the process of attacking the police

[56] This definition of agency should, for the purposes of this article, be detached from the enormous debate surrounding determinism, rational agency and other issues, which are outside the scope of this article. For interesting further perspectives on agency in other contexts, see V. Chiao, 'Action and agency in the criminal law' (2009) 15(1) *Legal Theory* 1; A. Bandura, 'Human Agency in Social Cognitive Theory' (1989) 44(9) *American Psychologist* 1175.

[57] See n 37 above, ch 9.

[58] n 47 above.

[59] BVerfGE 115, 118, 1 BvR 357/05, 15 February 2006. For illuminating commentary on this case, see F. Müller and T. Richter, 'Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006' (2008) 9(2) *German Law Journal* 161, 184-193; for further critical analysis, see K. Möller, 'On treating persons as ends: the German Aviation Security Act, human dignity, and the German Federal Constitutional Court' (2006) *Public Law* 457.

[60] BVerfGE 115, 118, ibid at [123]-[124].

[61] ibid at [163]-[164].

[62] For a critical analysis on the component elements of torture, see C. McGlynn, 'Rape, torture and the European Convention on Human Rights' (2009) 58(3) ICLQ 565-595.

officer or a nearby third party with a knife, such shooting would not amount to inhuman or degrading treatment.[63]

It is instructive to think also of the criminal law defence of self-defence, where we see that the notion of 'reaction' brings to focus considerations of the motive or purpose of the person 'reacting', as well as whether the action of an agent was such as to reasonably trigger the particular reaction.[64] Although there is significant disagreement on the precise rationale for the law on self-defence, it appears that respect for agency and dignity underlies perspectives that range from the deontological to the consequentialist.[65]

Waldron makes a point of this, alluding primarily to the criterion of purpose. His view is worth setting out in full:

> ECtHR doctrine holds that shackling a prisoner is degrading unless the shackling is necessary to stop the prisoner from harming others. Someone might ask: what is the difference between *this* invocation of an attendant possibility of harm to others, to justify what would otherwise be degrading, and (say) the invocation of the danger of terrorist attack to justify what would otherwise be degrading treatment during interrogation? [citation omitted]
>
> … In the shackling case, what is degrading is the use of chains without any valid justification. Once the justification is clear, the element of degradation evaporates. But in the interrogation case, we choose treatment that is inherently degrading, because it is precisely that *degradation* that will get the detainee to talk…[66]

Thus there is no affront to dignity or agency in shackling a potentially violent and dangerous individual for the purpose of preventing harm to himself or others, yet there is one in gratuitous force, or force used for the very purpose of inflicting feelings of anguish and degradation.

Between these two possibilities we find situations such as those in *Güler*, *Muradova*[67] and *Saya*.[68] Here, the Court inevitably engages in an assessment of the correspondence of the force used to any action by the alleged victims necessitating such force as reaction – any excess pushes the use of force into Article 3 territory.[69] Moreover, as highlighted above, the Court here expands on previous case law in which the use of force against a person deprived of his or her liberty would create a presumption of a breach of Article 3.[70] It can be argued that the Court applies this presumption in the case law regarding individuals in police custody because the agency of the individual in custody is compromised and the individual is generally within the control of the authorities; hence, the Court is not easily convinced that there was the sort of agent-respecting scenario of action and reaction addressed above.

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[63] See this line of analysis in the context of the interplay between Article 3 and expulsion in N. Mavronicola and F. Messineo, 'Relatively absolute? The undermining of Article 3 ECHR in *Ahmad v UK*' (2012) MLR (forthcoming).

[64] For a critical discussion on this topic, see S. Uniacke, 'Proportionality and self-defense' (2011) 30(3) *Law & Philosophy* 253.

[65] For an excellent outline of the debate, see F. Leverick, 'Defending Self-Defence' (2007) 27(3) OJLS 563.

[66] Waldron (n 37 above) 297-298.

[67] n 47 above.

[68] n 7 above.

[69] For a slightly diluted version of this strict proportionality analysis, see M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23(4) *Netherlands Quarterly of Human Rights* 674, 676-679.

[70] See, for instance, *Ribitsch v Austria* (n 16 above) at [38]; *Keenan v UK* (n 51 above) at [113].

Similarly, in situations of organised demonstrations policed by an organised group of fully equipped officers, the Court appears to recognise the likelihood that the State authorities are in a position of relative, if not total, control, thus undermining – though certainly not eliminating – the potential for the action and reaction scenario envisaged above.[71] This explains their approach in these 'demonstration' cases and in particular the shift in the burden of proof. Respect for the agency of the alleged victim of an Article 3 violation and the purpose of the perpetrator(s) are thus assessed in light of this parameter of control.

What, then, of the other potential circumstances in which the use of force is not prohibited by Article 3? Regarding the purposes of effecting an arrest[72] or taking bodily samples,[73] it appears that the language of qualification here is again an unfortunate by-product of Strasbourg's broad *prima facie* approach to use of force, as discussed above. What is ultimately the key criterion in cases such as *Muradova*[74] and *Jalloh*[75] is, again, the test of 'minimum level of severity'. Agency and dignity are relevant here. An individual's lawful arrest should be as easy or as difficult as the individual makes it – what we have, here, is again the action and reaction trajectory. The element of purpose is relevant to this trajectory also, insofar as it restricts this reaction to the necessary force required for the particular purpose of effecting a lawful arrest and no more than that.

A medical procedure that involves the taking of blood or saliva samples, performed in defiance of the will of the individual subjected to it for the purposes of obtaining evidence of his or her involvement in the commission of a criminal offence, appears particularly problematic from the perspective of dignity and agency. Yet, for the purposes of assessing this clearly, it is important to recognise the limitations of the significance of consent. Although consent can sometimes be key in setting the boundary between Article 3 proscribed ill-treatment and legitimate conduct (considering, for instance, sport)[76] lack of consent is not always the key to this boundary. Agency arguably constitutes the capacity to make choices rather than the concretised liberty to act in every way one chooses. It is clear, for example, that individuals do not choose to be arrested, to go to prison, to be injured by the person they are attacking, and yet it is legitimate to act against their wishes. Attacks on one's inherent capacity to choose, however, are problematic, and are reflected primarily in the absolute prohibition on torture.[77] Thus coercion does not always entail inhuman or degrading treatment. Ultimately, the overarching 'minimum level of severity' criterion is super-imposed here[78] and is meant to catch treatment that disrespects an individual's dignity in the performance of a lawful non-consensual procedure (as with non-consensual arrests). This overarching criterion catches treatment overreaching the limited purpose at issue and inflicting suffering akin to that inflicted in *Jalloh*.[79]

Lastly, contemplating medical necessity similarly highlights the fundamental point that coercion or absence of consent does not always entail inhuman or degrading treatment. It could be argued that force used with the direct purpose of preventing a person from harming another or to secure the health of someone – and solely for this purpose, under the criterion of necessity – is not wielded with the primary purpose of inflicting suffering, even if some

[71] This underpins the analysis in *Güler* at [29]-[31].
[72] n 21 above.
[73] n 25 above.
[74] n 47 above.
[75] n 25 above.
[76] Interesting perspectives on this can be found in M. James, *Sports Law* (Palgrave MacMillan 2010), ch 6; and S. Cooper and M. James, 'Entertainment – the painful process of rethinking consent' (2012) Crim LR 188, 194; J. Anderson, *The legality of boxing: a punch drunk love?* (Birkbeck Law Press, 2007).
[77] See Sussman (n 49 above).
[78] *Jalloh* (n 25 above) at [72].
[79] ibid.

physical or mental suffering is experienced through it, but seeks to secure the dignity and agency of the individual through securing their health. Moreover, the 'minimum level of severity' criterion is again super-imposed to the assessment – the Court is very sensitive to treatment that inflicts suffering or degradation which is not directly targeted to the purpose of preserving the individual's health.[80] The Court's approach in this context is certainly not free of controversy, yet I hope that the above analysis allows some room for explaining the Court's position and thereby criticising it with a greater sense of coherence.[81]

CONCLUSION

This article has sought to set out the points of interest in the reasoning of the ECtHR in *Güler and Öngel v Turkey* with a view to reflecting on scepticism regarding the absolute nature of Article 3 ECHR. I suggest that the misconception that Article 3 prohibits the use of force *per se*, based on the Court's generally strict *prima facie* approach to injuries, can be seen to be the basis for interpreting such case law as framing exceptions or qualifications to Article 3. Instead, the article proposes, the Court is setting out what amounts to inhuman or degrading treatment and what does not. The threshold between Article 3 proscribed treatment and non-Article 3 treatment has at its centre the 'minimum level of severity' test, which encompasses both quantitative and qualitative concerns. Both are difficult to penetrate, but the qualitative aspect is particularly under-analysed, not least, perhaps, by the Strasbourg Court. This article attempts to go some way towards rationalising the definitional exercise that takes place in the process of setting out what Article 3 'does not prohibit'.

Central to my analysis is the argument that, in situations where pain and suffering would be comparable, it is considerations of the dignity and/or agency of alleged victims of Article 3 proscribed treatment and of the *respect* for such dignity and/or agency by the alleged perpetrators of such treatment that yield different 'definitional' outcomes – that is, answers to questions such as whether shooting someone in the leg amounts to inhuman or degrading treatment or torture – in different circumstances. In fact, whether shooting someone in the leg amounts to Article 3 proscribed treatment cannot be considered independently of 'all the circumstances', as the Court's case law clearly indicates. The language of justifiability and proportionality is nothing more and nothing less than a painstaking process of defining and applying the difficult evaluative standards of 'inhuman' and 'degrading'. Ultimately, it is crucial that we engage in this difficult process and that we expect the Court to engage in it with as much clarity as possible.

[80] See, for instance, *VC v Slovakia*, App No 18968/07, Judgment of 8 November 2011 at [103]-[107].

[81] For further consideration of the implications of and issues surrounding Article 3's absolute nature, see N. Mavronicola, 'What is an "absolute right"? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights' (2012) HRLR (forthcoming).