

IS IT PERMITTED TO STRIKE A BALANCE BETWEEN THE INTERESTS OF NATIONAL SECURITY OF A STATE AND THE RULE OF NON-REFOULEMENT IN THE CONTEXT OF ARTICLE 3 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS?

Abstract

This study will explore the development and challenges facing the principle of non-return to torture and inhuman and degrading treatment (principle of non refoulement) in the current security sensitive climate. Special attention will be put on the attempts by states to overcome the Article 3 of the European Convention on Human Rights barriers to removal of terrorist suspects. This includes looking at the challenge to the absolute nature of prohibition of torture and inhuman and degrading treatment and punishment by some states' efforts to introduce a balancing test and the negotiation and use of diplomatic assurances.

Key words: *human rights, protection, prohibition of torture and inhuman and degrading treatment and punishment, European Court for Human Rights, principle of non refoulement, national security.*

1. Introduction

This study will explore the development and challenges facing the principle of non-return to torture and inhuman and degrading treatment in the current security sensitive climate. In particular, attention will be paid to the attempts by states to overcome the Article 3 of the European Convention on Human Rights ("ECHR") barriers to removal of terrorist suspects. This will include looking at the challenge to the absolute nature of Article 3 by some states' efforts to introduce a balancing test and the negotiation and use of diplomatic assurances.

States must engage in a difficult balancing act when faced with the terrorist threats and their obligations in human rights law as they must

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work within the confines of such law whilst also protecting their national security and public safety. However, this difficult balancing act between core rights is increasingly resulting in European states feeling constrained by human rights law and hence seeking to mould and develop that law in a way that accords with their domestic concerns. The extent to which this is permissible and justifiable within the human rights law regime and whether or not the regime can survive such challenges will be the focus of this study.

2. Article 3 ECHR

2.1. Absolute and Unqualified Nature of Article 3 and its Scope

Article 3 of the ECHR provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 3 was modeled on Article 5 of the Universal Declaration of Human Rights (“UDHR”), except that the reference to ‘cruel’ treatment and punishment was omitted, due to its wide and subjective interpretation.² This brief but powerful provision has been gradually interpreted by the European Court of Human Rights (“Court” or “ECtHR”), enlarging the areas to which Article 3 should apply, but also broadening the contents of the prohibition. Its huge case law represents a treasure trove of interpretation and explanation of its terms.³

Only a limited number of human rights, such as right to life, prohibition of torture or slavery and forced labour are considered absolute and unlimited. Because the prohibition of torture is so fundamental, it permits no qualifications or exceptions whatsoever. Article 15 of the ECHR provides for some derogations in time of war or public emergency. However, prohibition of torture cannot be derogated under any circumstances.⁴ Person’s personal integrity and dignity is absolutely protected, even more than life. There is a consensus that prohibition of torture and ill-treatment today has status of a peremptory norm of international law, or *jus cogens*, as the highest form of customary international law.

The absolute nature of the prohibition is also clearly expressed in Article 2.2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (“CAT”): “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal

² O. Z. Bekerman, “Torture – The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?”, (2005) 53 *Am. J. Comp. L.* 743, 6

³ A. Cassese, “Prohibition of Torture and Inhuman or Degrading Treatment or Punishment”, in R. MacDonald et al. (eds.), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers) (1993), 225-261, 228

⁴ C. Ovey, R.C.A. White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Oxford University Press) (4th ed., 2006), 74

political instability or any other public emergency, may be invoked as a justification of torture.”⁵

The prohibition against torture and other forms of ill-treatment extends beyond forbidding torture by the state itself; it precludes states from deporting individuals, or allowing their extradition to states where they would face a real risk of torture and other ill-treatment upon removal.⁶ To that extent, Article 3 has a certain extra-territorial application.⁷ It cannot be irrelevant how removed individuals will be treated in the receiving state.⁸

2.2. Principle of *Non-refoulement* and its Extension (in the sense of non-removal to face certain treatment) to Article 3

The idea that an international human rights treaty should protect certain individuals from the consequences that they may face on being returned to their country of origin by a third state was enshrined in the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) in respect of refugees and asylum seekers. This Convention codified principle of *non-refoulement* of those who met the definition. This principle, as set out in Article 33(1), provides that no refugee or asylum seeker should be returned to territories where he or she is likely to face persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.

The prohibition against *refoulement* in international refugee law regime is not absolute and exceptions are allowed in narrow circumstances, even if a person has a well-founded fear of persecution on one of the five enumerated grounds. The *non-refoulement* obligation in Article 33(1) of the Refugee Convention is limited by Article 33(2) such that *refoulement* is permitted if there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community in that country. Also, this principle is not available irrespective of conduct. Individuals who commit certain crimes or acts can be excluded from the protection of the Refugee

⁵ See e.g., HRC General Comment No. 20, Prohibition of torture or cruel, inhuman or degrading treatment or punishment (article 7), 10 March 1992

⁶ E. Metcalfe, “Torture and the boundaries of English law”, (2005) 2(2) *Justice Journal*, 79-89, 80

⁷ P. Leach, *Taking a case to the European Court of Human Rights* (Oxford: Oxford University Press) (2nd ed., 2005)

⁸ T. Vogler, “The scope of extradition in the light of the European Convention on Human Rights” in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension, Studies in honour of Gerard J. Wiarda* (Koln: Heymanns) (1988), 663-671, 664

Convention under the provisions in Article 1F.⁹

Although Article 3 of the ECHR does not contain an explicit prohibition against *refoulement*, the Strasbourg bodies have interpreted Article 3 to encompass this prohibition, based on what it expressly identifies as a set of shared norms: the “common heritage of political traditions, ideals, freedom and the rule of law” of the states parties to the ECHR.¹⁰ All types of removal, from formal processes of extradition, expulsion or deportation, as well as administrative schemes and ‘extra-legal transfers’ have to comply with this absolute prohibition.¹¹ The Strasbourg bodies’ case law in this area is of special kind, because the issue in these cases is not a violation of the Convention that has taken place, but a hypothetical violation which would take place if the state concerned proceeded with removal of individuals. In addition, although the real violator would be the receiving state, the sending state is also in breach of the Convention.¹²

3. The Scope of Article 3 in Removal Cases

3.1. Development of Case Law

The starting point in considering the impact of Article 3 on removal cases is the case of **Soering v United Kingdom**,¹³ a case in which the applicant resisted extradition to the United States (“US”) to stand trial in Virginia on the ground, *inter alia*, that if convicted there of murder he might be sentenced to death and endure ‘death row phenomenon’, i.e. awaiting for the execution for extended periods of time, in special prison department for years, sometimes even for decades, because the death penalty is being postponed for various reasons including the exhaustion of various legal remedies. The Court has unanimously found that it is contrary to the prohibition in Article 3 to allow extradition of a person who is facing a real risk of subjection to inhuman or degrading treatment and punishment.

It is also notable that the Court referred to other international human rights conventions and in particular the CAT which, by Article 3, provides that no state party shall expel, return (“*refouler*”) or extradite a

⁹ The Convention shall not be applicable to a person if: a) he has committed a crime against peace, a war crime, or a crime against humanity; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes of the United Nations.

¹⁰ *Soering v United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; (1989), 11 EHRR 439, para. 88

¹¹ L. Arbour, UN High Commissioner for Human Rights, Address at Chatham House and the British Institute of International and Comparative Law, 15 February 2006

¹² H. Danelius, “Protection Against Torture in Europe and the World”, in R. MacDonald et al. (eds.), *op.cit.*, *supra*, n. 2, 263-275, 270

¹³ *Soering v United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; (1989), 11 EHRR 439

person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture and that for the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including the existence in the state concerned of a consistent pattern of gross, flagrant and mass violations of human rights.

Article 3 ECHR is concerned with ill-treatment of a broader nature than simply torture as defined in CAT. Nonetheless, the ECtHR was seeking to achieve comparable protection under Article 3 ECHR in extradition cases, so it uses the language of CAT ('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') in formulating its prohibition against surrender to the possibility of torture.¹⁴ It then extends it to a 'real risk' of inhuman treatment or degrading treatment. There can be no difference between 'real risk' and 'in danger'. They are two ways of expressing the same degree of risk.

Paragraph 89 of the Court's judgment referred to the well-known mantra of the 'fair balance' between the interests of the community and those of the individual. This was for the first time that the Court made a hint that there may be a balancing test in relation to removal cases. It referred to the need to have effective extradition arrangements, to avoid the creation of safe heavens and suggested that these factors would weigh in the determination of whether prospective ill-treatment was, or was not, inhuman or degrading for the purposes of this type of case. This reference to the fair balance appears to have been a particular manifestation of the general principle identified in paragraph 100 of the judgment, which must be applied when searching for the minimum threshold necessary to breach Article 3. Paragraph 100 of the judgment is important because it contains the well-established reference to the assessment of the minimum level of severity being relative. There, the Court expressed that ill-treatment, in order to fall within the scope of Article 3, must attain a minimum level of severity. The assessment of this minimum is relative, it 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 execution, its duration, physical or mental effects and, in some instances, the sex, age and state of health of the victim.¹⁵

The principle established in *Soering* was soon extended from extradition to removal cases. This is shown in cases of **Cruz Varas v**

¹⁴ Para. 88 of the judgment

¹⁵ Para. 100 of the judgment

Sweden¹⁶ and **Vilvarajah v United Kingdom**.¹⁷ Neither had a national security or other feature which called for any potential balancing exercise. Both cases applied the test established in *Soering*, but the Court concluded that ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3, and the evidence must show that there were substantial grounds for believing that the particular applicant was at real risk of being subjected to ill-treatment if returned to the State where the conflict was occurring. Accordingly, mere membership of a particular minority group is not in itself enough to fall into the scope of the *Soering* principle.¹⁸

It can be seen that there is no reference to the concept of a balance, as appeared in *Soering*. Instead, when discussing the minimum level of severity required to trigger an Article 3 complaint, the Court talked of the assessment being ‘relative’, as the Court had done in paragraph 100 in *Soering*. The same formulation appeared in the Commission decision in **Dehwari v Netherlands**,¹⁹ paragraph 72, and in **Hilal v United Kingdom**²⁰, paragraph 47.

3.2. Absolute Right in Respect of Return - The Principle in **Chahal v United Kingdom**

Chahal v United Kingdom²¹ was a case in which the Court had to confront an argument that the threat posed to national security by the applicant, Mr Chahal, should be balanced against the risks he would face on return to India. The Court noted that the British Government sought to rely upon the ‘fair balance’ observations in *Soering* and also that the Commission delegate (Nicholas Bratza) argued that while the Article 3 guarantees were absolute in nature, those passages in *Soering* should be taken to suggest that doubts about the likelihood of ill-treatment should be resolved in favour of the State, rather than the individual. The British Government argued that Article 3 prohibition was not absolute in cases of removal, and that the assessment should take into consideration other factors, such as the threat that the individual is posing to the domestic national security. There should be an implied limitation of the right. The danger which the individual posed to the domestic national security of the country in question should at least be allowed to be weighed in the

¹⁶ *Cruz Varas and others v Sweden*, Judgment of 20 March 1991, Series A, No. 201; (1992) 14 EHRR 1

¹⁷ *Vilvarajah and others v United Kingdom*, Judgment of 30 October 1991, Series A, No. 215; (1992) 14 EHRR 248

¹⁸ A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford: Oxford University Press) (2004), 123

¹⁹ *Dehwari v Netherlands*, (App. 37014/97), Judgment of 27 April 2000; (2000) 29 EHRR CD 7

²⁰ *Hilal v United Kingdom*, (App. 45276/99), Judgment of 6 March 2001; (2001) 33 EHRR 31

²¹ *Chahal v United Kingdom*, (App. 22414/93), Judgment of 15 November 1996; (1997) 23 EHRR 413

balance, similarly to the Refugee Convention.²²

The Court then set out the core of its reasoning, stating that the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases and that the state party should safeguard an individual facing a real risk of being subjected to treatment contrary to Article 3 if removed to another state. The Court was unequivocal in its conclusion that the activities of the individual concerned, despite of being undesirable or dangerous, were immaterial. Also, the Court rejected the argument of the United Kingdom (“UK”) based on Article 32 and 33 of the Refugee Convention to the effect that it would be wrong to use Article 3 ECHR to emasculate provisions in the Refugee Convention since they deprive individuals seriously believed to be involved in terrorism of its protection. Therefore, the protection provided by Article 3 is wider than that provided by the Refugee Convention.²³

However, the Court, sitting as a Grand Chamber, was far from unanimous. The finding of a violation of Article 3 was by a majority of 12 to 7. In addition to concluding that Mr Chahal had not substantiated the risk of Article 3 ill-treatment, the dissenting judges held that the state “may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter state would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.”²⁴

The judgment in the *Chahal* case is of utmost importance. Firstly, the Court had reaffirmed the absolute and fundamental character of the prohibition of torture and rejected the argument advanced by the British Government that there should be an implied limitation to Article 3 allowing application of the balancing test.²⁵ Secondly, the judgment confirms that those facing expulsion must have access to a remedy which secures independent scrutiny of the alleged risk of ill-treatment upon return to the receiving country. Finally, it highlights the deficiencies of the Refugee Convention which provides protection only to persons recognised as refugees under the 1951 Refugee Convention and to asylum seekers who are awaiting a decision on their refugee status whereas the

²² C. J. Harvey, “Expulsion, National Security and The European Convention”, Case Comment, *E. L. Rev.* 1997, 22 (6), 626-633

²³ Paras. 80, 81 and 82 of the *Chahal* judgment.

²⁴ Joint Partly Dissenting Opinion of Judges Golcuklu, Matscher, Freeland, Baka, Gotchev, Bonnici and Levits

²⁵ C. J. Harvey, *loc. cit.*, *supra*, n. 22

Strasbourg bodies' case law protects anyone, even illegal entrants, whatever their activities or personal conduct,²⁶ who risk ill-treatment if removed to another country.²⁷ While the rule of *non-refoulement* in Article 33 is viewed as a cornerstone of modern refugee law, it is seriously flawed because it permits limitations on national security grounds. This is why Article 3 of the ECHR, although not explicitly prohibiting *refoulement*, has often been referred to as a complementary “safety-net” mechanism of protection.²⁸

Only a month after *Chahal*, in **Ahmed v Austria**,²⁹ the Court recited the conclusions of the majority in *Chahal* on the question whether the conduct of the applicant was a relevant factor as settled law. And so it has remained.

3.3. Conclusions on the Strasbourg Jurisprudence

The line of authority stretching from *Soering* establishes unequivocally that Article 3 of the ECHR may effectively prevent the expulsion of an alien. The apparent flicker of recognition in paragraph 89 of *Soering* that a general balancing exercise may be required in such cases was extinguished in *Chahal* by the majority of the Grand Chamber and has never been revived. Despite the conclusion in that case being by majority, it represents settled Strasbourg jurisprudence. That is important for two reasons. First, it is unimaginable that anything other than a decision of the Grand Chamber could upset the earlier conclusion that the personal behaviour of an applicant should be ignored when deciding whether Article 3 should prevent an expulsion. Secondly, the UK courts, whilst not bound by the ECtHR *strict sensu* will follow clear and constant jurisprudence from Strasbourg in the absence of some special circumstances.

3.4. The Canadian Approach

In **Suresh v Canada**,³⁰ the Supreme Court considered the position of a Sri Lankan national who argued that he faced the risk of torture if he were returned there from Canada. The context of the argument was the Canadian Charter of Rights and Freedoms. The Court reviewed the international law position, however, it concludes that “we leave open the

²⁶ H. Lambert, “Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue” (1999) 48 *Int'l & Comp. L. Q.* 515, 516

²⁷ H. Danelius, *op. cit.*, *supra*, n. 11, 270

²⁸ E. Feller, Director of the Department of International Protection, UNHCR, Speech at the Second Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons, Strasbourg, 19-20 May 2000

²⁹ *Ahmed v Austria* (App. 25964/94), Judgment of 17 December 1996; (1997) 24 EHRR 278

³⁰ *Manickavasagam Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada* (*Suresh v Canada*), 2002, SCC 1, File No. 27790, 11 January 2002

possibility that in an exceptional case such deportation might be justified either in the balancing approach under s. 7 or 1 of the Charter.”³¹

Whilst the balancing approach survives (only) in Canada it springs from a consistent line of authority interpreting the material sections of the Charter as importing a balance. Therefore, the Court adopted a balancing approach, where the risk of torture must be balanced against the threat to national security of Canada, thereby leaving the door open to deportation in exceptional circumstances even when the deportee faces a high risk of torture.³² The implication is that the higher the risk to national security of Canada, the more likely that deportation will be justifiable, even if it is likely that the acts of torture would be inflicted.³³ This decision may have important implications for the way convention refugees and asylum seekers are treated in Canada, but it also may have a far-reaching impact in other refugee-receiving countries in post 11 September world order.³⁴

In May 2005, the Committee against Torture, in its concluding observations on the report of Canada, expressed its concern at ‘the failure of the Supreme Court of Canada, in *Suresh v Minister of Citizenship and Immigration*, to recognise at the level of domestic law the absolute nature of the prohibition of Article 3 of the Convention, which is not subject to any exception whatsoever.’³⁵

4. Introduction of Balancing Act

4.1. Intervention in the *Ramzy* Case

Following the terrorist attacks in New York and Washington on 11 September 2001, in Madrid on 11 March 2004, and in London on 7 July 2005, the British Government has called into question the absoluteness of the prohibition of torture. In October 2005, the Government made known that it would intervene, along with the Governments of Italy, Lithuania, Portugal and Slovakia, in the case of **Ramzy v The Netherlands**³⁶ before the ECtHR. This case concerned the proposed removal of the applicant, suspected of involvement with an Islamic extremist group in the Netherlands, from this country to Algeria. He claimed that he would be exposed to torture and ill-treatment in the hands of Algerian authorities.

In the *Ramzy* case, the British Government was seeking to reverse

³¹ Para. 129 of the judgment

³² O. C. Okafor and P. L. Okoronkwo, “Re-configuring Non-refoulement? The Suresh Decision, ‘Security Relativism’, and the International Human Rights Imperative” (2003) 15 *Int’l J. Refugee L.* 1, 46

³³ *Ibid.*

³⁴ *Ibid.*, 32

³⁵ CAT/C/CR/34/CAN, para. 4(a)

³⁶ *Ramzy v The Netherlands* (App. 25424/05)

or limit the principle established in *Chahal*, consistently followed by the European Court and other human rights bodies, such as the HRC and CAT Committee for almost the whole decade. The view of the Government was that, in light of fight against terrorism, the approach to national security has changed significantly since 1997 when the case was decided. Therefore, the *Chahal* case should be reopened and the position taken by the minority in the case upheld.³⁷ Therefore, a State, when deciding whether to remove an individual, should be able to struck a balance in those cases when the risk of being exposed to torture or other ill-treatment is quite low, and the risk of threat to national security of the state is quite high. Conversely, the greater the risk of ill-treatment, the less weight should be given to the threat to the national security. Where, on the evidence, there is a “substantial doubt” as to whether the person would indeed be subjected to torture or ill-treatment upon removal, the threat to security could be sufficient to justify removal.³⁸ Therefore, according to this view, the absolute prohibition on torture may in some circumstances be overruled by national security considerations. The absolute right becomes qualified.

This intervention emphasised that the Convention recognises the need for balance, which may in extraordinary times necessitate derogations from the practices in times of peace and tranquility and that the position of the British government is not to exclude those who face deportation of Article 3 protection but to protect the rights of those whose lives are threatened by a suspected terrorist.³⁹

4.2. Protection of Victims of Terrorism

The very first principle in the Guidelines of the Council of Europe (“CoE”) Committee of Ministers on human rights and the fight against terrorism is ‘states’ obligation to protect everyone against terrorism’. Therefore, states are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies states’ fight against terrorism in accordance with the present Guidelines.⁴⁰

Furthermore, consideration should be given to the rights of the victims of terrorism which enables states to claim that, when taking measures against

³⁷ Joint Partly Dissenting Opinion, *loc. cit.*, *supra*, n. 23

³⁸ Nineteenth Report of Session 2005-06, The Joint Committee on Human Rights, *The UN Convention Against Torture (UNCAT)*, Order 2006, para. 20

³⁹ Attorney General Lord Goldsmith, Speech to the Council of Bars and Law Societies in Europe, 19 November 2005

⁴⁰ Principle I, *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies

terrorists, they are acting to protect the human rights of these victims. Counter-terrorism policies and operations are then assessed, not by considering the impact on the human rights of people against the interest of preserving public order or fighting crime but in balancing the rights of terrorist suspects against the rights of the victims of terrorist action.⁴¹

4.3. Positive Obligations

The ECHR sees member states as solely responsible for the protection of human rights of those within their jurisdiction. The Court has distinguished a number of positive obligations on states. The right to life protected in Article 2 ECHR requires states not only to refrain from the intentional and unlawful taking of life, but also to take steps to safeguard the lives of those within its jurisdiction.⁴² The Court has interpreted the Convention that there may be a positive obligation on the state to provide individuals with suitable protection against immediate threat to their lives from third parties, where the threat was known to the security forces and it would have been reasonable for positive steps to have been taken to protect an individual from the danger.⁴³ Such duty implies ‘a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’,⁴⁴ if that is ‘in a way which does not impose an impossible or disproportionate burden on the authorities’.⁴⁵ The leading authority, the case of *Osman*, suggests that the duty is a narrow one, leaving a wide margin of appreciation to the State about the deployment of its protective force.⁴⁶

Therefore, the Government is bound by a positive obligation to protect its own citizens from violations of Article 2 and 3, therefore making the ECHR guarantees of practical value.⁴⁷

In UK there is a problem of bringing suspected terrorists to trial where the evidence against them would be inadmissible because the Government did not want to reveal its source in the intelligence-gathering processes or because it was hearsay information.⁴⁸ Where such suspects were foreign nationals, it would have ordinarily been possible to deport

⁴¹ C. Warbrick, “The European Response to Terrorism in an Age of Human Rights” (2004) 15 *EJIL* 5, 994

⁴² *Osman v United Kingdom* (App. 23452/94), Judgment of 28 October 1998; (1998) 29 *EHRR* 245, para. 115 of the judgment

⁴³ A. Mowbray *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart) (2004), 15

⁴⁴ *Osman v United Kingdom*, *loc. cit.*, *supra*, n. 41, para. 115 of the judgment

⁴⁵ *Ibid.*, para. 116 of the judgment

⁴⁶ *Ibid.*, paras. 115-116

⁴⁷ A. Mowbray, *op. cit.*, *supra*, n. 42, 17

⁴⁸ C. Warbrick, *loc. cit.*, *supra*, n. 40, 1007

them to their national state. However, a barrier to their removal could arise in light of the principle established in *Chahal*. So the Government was faced with the prospect that non-UK nationals whom it suspected of being involved in activities seriously detrimental to the UK's national security, and who could harm its citizens, could not be prosecuted in the UK nor removed to another state, nor could they be detained under the existing law, either as criminal suspects or as persons awaiting deportation.⁴⁹ In order to deal with these cases, the legislation proposed a power of detention, which would require the submission of a notice of derogation to make it compatible with the ICCPR and the ECHR. The English Court has held that detention for deportation is unlawful.⁵⁰ This is the reason why the Government argued that not being allowed to remove these persons amounts to a breach of its positive obligations to protect its own citizens and that the balancing test should be introduced in Article 3 because there are different competing obligations under the ECHR. The use of such a test would allow the Government to balance the risk to people in the UK to the risk to the foreign national. Only if the foreign national would face a real risk if removed, while he poses only a limited risk to the domestic national security, the balance would be in favour of him remaining in the country.

4.4. National Security

Another problem is that the notion of 'national security' is a widely defined, subjective concept in the UK case law, where the government has the main role in the assessment of any threat.⁵¹ Because of the excessive secrecy attached to national security, it is usually impossible for members of public to know whether the government is talking about direct or indirect threats to national security. The threat may not be a direct threat to the UK, but a threat to another countries' national security. If there is no direct threat to people in the UK, then do they need Article 2 right protecting by a policy of removing dangerous individuals pursuant to a balancing test? The key weakness in the above argument is that there may not be a direct risk to the UK citizens in order for deportation on national security grounds to be relied on.

In the **Secretary of State for the Home Department v Rehman**⁵² the House of Lords delivered an important decision on the issue of national

⁴⁹ *Ibid.*, p. 1008

⁵⁰ *Ibid.*, p. 1008

⁵¹ ILPA Submission to the Secretary of State on Exclusion or Deportation from the UK on Non-Conductive Grounds: Consultation Document, para. 4, at *C:\Documents and Settings\user\My Documents\Dissertation ILPA Laeken summit.htm*

⁵² *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 (HL)

security. Mr. Rehman, a Pakistani national, was subject to deportation on order of the Home Secretary on the ground that he was considered to be a danger to national security. He appealed to the Special Immigration Appeals Commission, established by Act of Parliament in 1997 with the aim to bring the UK law into conformity with the ECHR following the Court's judgment in the *Chahal* case, which upheld his appeal.⁵³

The Commission had ruled that national security could be a valid ground for deportation only if it could be shown that the deportee had taken part in "violent activity which is targeted at the UK, its system of government and its people".⁵⁴ The government argued that this was too narrow to define national security as to include only threats targeted in the country. Government argued that national security could be threatened by action targeted at some other jurisdiction, even if no British subjects were directly involved, which was accepted by both the Court of Appeal and the House of Lords.⁵⁵

Although judges in *Rehman* avoided to give a clear definition of the notion of national security, they did make clear that indirect threats to British national security, manifested in the promotion of terrorism abroad, were included in the definition.⁵⁶ They made it clear that the promotion of terrorism against any state, although not a direct threat to the UK, is capable of indirectly affecting the UK's national security, because of the mutual interdependence of the countries, especially in the light of joint combat against terrorism,⁵⁷ since security of one country is dependent upon the security of others,⁵⁸ and therefore any conduct which could have an adverse effect on the UK's relationship with a friendly state, could threaten the UK's national security.⁵⁹ Consequently, planning of terrorist acts abroad could be basis for the deportation.

4.5. An Alternative Solution

An alternative solution to removing alleged terrorist suspects to their countries of origin where they will face ill-treatment is their prosecution in the sending state.⁶⁰ However, there is a problem that the sending state cannot prosecute those suspects because the government, for

⁵³ A. Tomkins, "Defining and Delimiting National Security", Case Comment (2002) *L. Q. Rev.*, 1

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ ILPA, *loc. cit.*, *supra*, n. 50, para. 5

⁵⁷ *Secretary of State for the Home Department v Rehman*, *loc. cit.*, *supra*, n. 51, Lord Slynn, para. 16

⁵⁸ *Ibid.*, Lord Slynn, para. 28

⁵⁹ ILPA, *loc. cit.*, *supra*, n. 50, para. 5

⁶⁰ R. Bruin and K. Wouters, "Terrorism and the Non-derogability of Non-refoulement" (2003) 15 *Int'l J. Refugee L.* 5, p. 13

example, does not want to reveal its source in the intelligence-gathering processes or because it was hearsay information.⁶¹ The solution may be in the establishment of special tribunals or commissions. Also, prosecution may require specific safety precautions, and the terror suspects would have to be kept in high security detentions pending trial. The obstacles towards prosecution of terror suspects in a sending state were apparent in the *Ramzy* case, where Mr Ramzy was acquitted by the court in the Netherlands because the intelligence reports relied on by the prosecution could not be used in evidence due to their secrecy, and the defence had not been given the chance to verify the information in the reports in an effective manner. In special courts or commissions, evidence obtained by intelligence would be accessible and trial would be possible.⁶²

4.6. Conclusions on the Absolute Nature of Article 3

There is little prospect of persuading the Grand Chamber to revisit the principle established in its *Chahal* judgment. It does not seem to be realistic to persuade the Court that the fight against terrorism should lead to a weakening of human rights protection. The United Nations resolutions encouraging cooperation in the international fight against terrorism will not assist the argument, because they are all crafted in the environment of international human rights law.

5. The Use of Diplomatic Assurances

5.1. Defining Diplomatic Assurances

Although fully aware of their obligation not to return individuals to face mistreatment, states have increasingly been seeking to obtain diplomatic assurances to facilitate and legitimize the removal of non-nationals to third countries with dubious human rights records.⁶³ Diplomatic assurances are formal promises from the government of the receiving country that the removed person will not be subjected to illegal treatment upon removal. In the past, such assurances were used primarily as a migration control tool.⁶⁴ Today they serve as a way to

⁶¹ C. Warbrick, *loc. cit.*, *supra*, n. 40, 1007

⁶² S. Isman, *Diplomatic Assurances-Safeguard against Torture or Undermining the Prohibition of Refoulement?* (2005) Master Thesis, University of Lund, 7, at <[http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/7ED944C141D6583DC1257114006C4721/\\$File/exam.pdf?OpenElement](http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/7ED944C141D6583DC1257114006C4721/$File/exam.pdf?OpenElement)>

⁶³ G. Noll, "Diplomatic Assurances and the Silence of Human Rights Law", 1, at <[http://www.jur.lu.se/Internet/forskare/Noll.nsf/43e828219552bacc12568cd0028a0b9/d328a8315ca45ac0c12571130069d164/\\$FILE/NollDiplomaticAssurances2006.pdf](http://www.jur.lu.se/Internet/forskare/Noll.nsf/43e828219552bacc12568cd0028a0b9/d328a8315ca45ac0c12571130069d164/$FILE/NollDiplomaticAssurances2006.pdf)>

⁶⁴ *Ibid.*

extradite or deport terror suspects who are considered to be a threat to national security, in the context of asylum law, but also in the context of extraordinary rendition.⁶⁵

5.2. Differences between Assurances

Governments have been resorting to diplomatic assurances to provide for safeguards of individuals against death penalty, unfair trial, and the risk of torture and other forms of ill-treatment.

Diplomatic assurances in the context of death penalty should be distinguished from those in context of torture and ill-treatment because the former are not generally prohibited in international human rights law, they serve merely to acknowledge the different legal approaches of two states, as a tool that allows an exception to one state's laws and policies as an adjustment to the concerns of another state. The latter are absolutely prohibited in regional and international human rights instruments and customary international law as an unacceptable, criminal behaviour. Furthermore, whereas death penalty is openly practiced by those states under the authority of their national legislations, torture is always performed clandestinely, in secret, breaching both international and domestic law and represents an illegal process *per se*.⁶⁶ Finally, execution of death penalty is easier to monitor, whereas torture is always performed far from the eyes of public, making it unavailable to be put under the scrutiny.⁶⁷ Further, in the context of a fair trial these assurances are easier to monitor, and the harm in case of breach can be rectified.⁶⁸

Diplomatic assurances may be formulated as individual or collective.⁶⁹ Individual assurances are sought for a specified individual or individuals. They were issued in the case of *Soering*, in order to enable the extradition of Mr Soering to the USA by guaranteeing that the death penalty will not be imposed upon trial. Also, the Government of India issued individual assurance for *Chahal*, promising that this Sikh activist would not be subjected to torture and ill-treatment upon his removal to India.

Collective assurances are usually formulated as a specific clause in readmission agreements, usually referring to a group of persons. Following London underground attacks in July 2005, a Memorandum of Understanding was concluded with Jordan in order to seek the return of terror suspects, applying to any citizen of the receiving State specified

⁶⁵ S. Isman, *loc. cit.*, *supra*, n. 61, 23

⁶⁶ Nineteenth Report of Session 2005-06, *loc. cit.*, *supra*, n. 37, para. 121

⁶⁷ *Suresh v Canada*, para. 124

⁶⁸ S. Isman, *loc. cit.*, *supra*, n. 61, 6

⁶⁹ *Ibid.*, p. 24

prior to removal. Two countries have undertaken to comply with their human rights obligations regarding any person returned to the receiving state under that arrangement.⁷⁰

5.3. International Law and Jurisprudence Regulating Diplomatic Assurances

International law does not preclude states from concluding agreements with the receiving state to eliminate the risk of torture and ill-treatment. None of the treaties containing prohibition of torture neither envisions nor prohibits their use.⁷¹

In Europe, the only explicit provisions regulating the use of diplomatic assurances are in Article 11 of the European Convention on Extradition and in Article 4 of the Protocol amending the European Convention on the Suppression of Terrorism, as well as in Article 5 of the European Arrest Warrant, guaranteeing that the person to be surrendered will have an opportunity to apply for a retrial of the case in which the decision was rendered *in absentia*.⁷²

The ECtHR has established in *Soering* the standard that diplomatic assurances are not an adequate safeguard for removal to states where torture is “endemic” or a “recalcitrant and enduring problem”.⁷³ In *Chahal*, the ECtHR rejected the UK’s reliance on assurances issued by the Government of India that Mr Chahal would not be subjected to torture or other forms of ill-treatment at the hands of Indian authorities as an inadequate guarantee of safety, but the Court’s reasoning did not go so far as to rule out any reliance of diplomatic assurances, but rather in light of the particular situation prevailing in India at the time.⁷⁴ In *Mamatkulov* case, the Court did not elaborate the issue of the legality of the assurances, but in a joint dissenting opinion, three dissenters concluded that a diplomatic assurance, even if given in good faith, that an individual will not be subjected to ill-treatment, is not in itself a sufficient safeguard where there are doubts as to its effective implementation.⁷⁵ The strength of the assurance must in every case be assessed in light of the situation prevailing in that State at the material time.

⁷⁰ *Ibid.*, p. 26

⁷¹ *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (“*Torture by Proxy*”) The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law (2004), 84

⁷² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

⁷³ *Soering v United Kingdom*, paras. 104-105

⁷⁴ *Chahal v United Kingdom*, paras. 37, 89, 104-105

⁷⁵ *Mamatkulov and Askarov v Turkey*, (App. 46827/99 and 46951/99), Judgment of 4 February 2005 14 BHRC 149 and (Grand Chamber) 4 February 2005, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, para. 10

As it was concluded by the Joint Committee on Human Rights, the practice of resorting to diplomatic assurances is not completely ruled out, in principle such assurances are capable of satisfying that the state's obligation not to remove a person to a country where there is a real risk of torture and other forms of ill-treatment.⁷⁶ However, these practices should be under close scrutiny, and ultimately it would be one of the factors that the courts should weight when assessing the risk of torture in the context of individual circumstances of each particular case.⁷⁷ The courts should take into consideration the situation in the state to which the removal is proposed, circumstances regarding the person that is to be removed and the nature of the protection offered by assurances.⁷⁸

The British Government concluded Memoranda of Understanding with a number of countries to enable returning of foreign nationals, Islamic fundamentalists, presently in the UK, to their countries of origin, where they would face torture upon return.⁷⁹ None of the memoranda contains explicit provision concerning torture, but that removed individuals will be "afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards."⁸⁰ Each of the memoranda provides for prompt and regular private visits from representatives of an independent body nominated jointly by both states. None of the memoranda provides for independent medical personnel, or whether the medical examination will take place in private without the presence of representatives of detaining authorities, or whether or to whom will submit reports. Monitoring body is not specified in none of the memoranda.

Human rights community generally has a negative attitude towards diplomatic assurances since their inherent weakness is that they are sought only from those states where it is assessed that removed persons would otherwise be likely to be subjected to ill-treatment, given the systematic and endemic use of torture in those states.⁸¹ In addition, the governments that give assurances are not in a position to provide an effective guarantee against their use, because of the lack of control over regional or local authorities.⁸² This was, for instance, the case in *Chahal*, where the Court found that assurances given by the Indian government would not be an adequate safeguard because there was insufficient state control of individual

⁷⁶ Nineteenth Report of Session 2005-06, *loc. cit.*, *supra*, n. 37, para. 126

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para. 127

⁷⁹ M. Nowak, "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment!", (2005) 23 *N.Q.H.R.* 4, p. 676, 687

⁸⁰ Nineteenth Report of Session 2005-06, *loc. cit.*, *supra*, n. 37, para. 105

⁸¹ M. Nowak, *loc. cit.*, *supra*, n. 78, 685

⁸² Nineteenth Report of Session 2005-06, *loc. cit.*, *supra*, n. 37, para. 113

officers on the ground to ensure the applicant's safety.⁸³

Another argument advanced by human rights community against the use of diplomatic assurances is that the fact that torture is always practiced clandestinely and the perpetrators are generally expert at keeping abuses from being detected, and that the victims are often reluctant to talk about the suffering due to the fear of retaliation is a factor that disables functioning of the post-return monitoring mechanism. In addition, sending state usually has no motivation to determine that torture has actually been used because doing so would amount to an admission that it has breached its obligation not to torture.⁸⁴

The former Special Rapporteur on torture has expressed that diplomatic assurances should not be ruled out a priori in all situations.⁸⁵ However, such assurances should contain unequivocal guarantee that the individual will not be subjected to torture or any other form of ill-treatment, and that a monitoring mechanism should be put into place.⁸⁶ In the case of *Suresh*, the Canadian Supreme Court offered guidelines for the assessment of the adequacy of diplomatic assurances. This assessment should be consisted of an evaluation of the human rights record of the government offering assurances, the government's record of complying with given assurances, and the capacity of the government to fulfill the assurances, in particular where there is doubt about the government's ability to control its security forces.⁸⁷

5.4. Conclusions on Diplomatic Assurances

European and other states, seeking to remove terrorist suspects, accept that they cannot remove them in contravention of Article 3 so they are trying to eliminate the risk of torture by resorting to diplomatic assurances. Reliance on diplomatic assurances creates a loophole in the obligation of non-removal of individuals to face torture, and in the final analysis erodes the prohibition of torture and other ill-treatment.

Diplomatic assurances are often seen as 'a formal aberration', as a mere iteration of already existing human rights obligations, adding no further substance to it.⁸⁸ This brings a conflict of universal and multilateral human rights treaty law with the bilateral obligation that emanates from

⁸³ *Ibid.*, para. 114

⁸⁴ Association for the Prevention of Torture ("APT"), at <http://www.ap.t.ch/call_for_action.shtml>

⁸⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr T. van Boven, para. 30, at <<http://www.ohchr.org/english/bodies/chr/docs/ga59/324.doc>>

⁸⁶ *Ibid.*, para. 40

⁸⁷ *Suresh v Canada*, para. 125

⁸⁸ G. Noll, *loc. cit.*, *supra*, n. 62, 2

the diplomatic assurance.⁸⁹

States are already parties to binding multilateral treaties of international or regional character prohibiting torture, and other ill-treatment and *refoulement* to such practices.⁹⁰ Diplomatic assurances are ad hoc arrangements, agreed outside the currently existing treaty regime on torture, creating individual bilateral agreements among states merely undermining the universal treaty regime as they encourage other states to start concluding their own separate agreements outside the regime system thus weakening it. They thus create a two-class system amongst those removed, with the intent to provide special bilateral protection and monitoring for a selected few while ignoring many others in the same situation, thereby condoning torture and other forms of ill-treatment by acknowledging that these practices exist in the receiving State,⁹¹ or producing “an island of legality, in a sea of illegality”.⁹² Negotiation of individual assurances implies weakening of the absolute prohibition against torture, suggesting that the fact that the assurance is needed in an individual case implies that a state practices torture systematically.⁹³

Therefore, practice of diplomatic assurances may undermine the multilateralism, well-established universal legal prohibition not to remove anybody if there is serious risk of torture or ill-treatment in the receiving state. Thus, it represents a step backward in international human rights protection.⁹⁴ However, this is conspicuously not an obstacle for the state to continue concluding diplomatic assurances. If states continue to rely on this practice when removing individuals to countries with dubious human rights records, more and more states will copy the practice. In the final analysis, this may affect the content of international human rights law.

6. Conclusion

Acts of international terrorism pose a genuine threat to the safety and well being of all people, and the governments are entitled, indeed required, to meet the threat. However, circumventing international human rights legal instruments will not eliminate the threat. Provisions of international human rights law were enacted to meet the needs of governments in time of both peace and emergency. Although virtually every state continues ritualistically to condemn all torture, their attempts

⁸⁹ *Ibid.*

⁹⁰ L. Arbour, *loc. cit.*, *supra*, n. 10

⁹¹ *Ibid.*

⁹² Interview of Julia Hall, Counsel and Senior Researcher, Europe and Central Asia Division, Human Rights Watch, June 14, 2004, Notes on file with the ABCNY International Human Rights Committee

⁹³ Nineteenth Report of Session 2005-06, *loc. cit.*, *supra*, n. 37, para. 123

⁹⁴ *Ibid.*, para. 124

to circumvent the Article 3 obstacles show that the real conviction is not always behind the strong language. States seem to be more and more determined to eradicate all forms of terrorism. However, this brings the risk that they will try to sacrifice their commitments to ideals of fundamental justice. The prohibition of torture is an important and fundamental principle, but when circumstances become extreme, it is not the only value in play. Its absolute nature rejects the legitimacy of any form of balancing. The balancing act is difficult to apply in practice and it is subject to inherent biases that would eventually lead in more torture. Any form of condoning torture erodes this most basic principle of international law and human rights. Once allowed only under limited conditions, it cannot be kept under control. In other words, Pandora's Box is open.

Within the European human rights protection system, states have become accustomed to external legal scrutiny, which has enabled the Court to extend its jurisprudence in context of Article 3 both in depth and breadth. This is an indication that a step backwards from the high moral ground established by the Court in a security sensitive world is highly unlikely, at least viewed in the short term. However, the Court has repeatedly emphasised in its work that the Convention is a living instrument that must be interpreted in the light of present-day conditions. It remains to be seen whether the long and complex fight against terrorism will have a detrimental effect on the level of protection currently afforded under Article 3 in the longer term.

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**DA LI JE DOZVOLJENO USPOSTAVLJANJE BALANSA
IZMEĐU INTERESA NACIONALNE BEZBEDNOSTI JEDNE
ZEMLJE I PRAVILA *NON-REFOULEMENT* U KONTEKSTU
ODREDBE ČLANA 3 EVROPSKE KONVENCIJE ZA ZAŠTITU
LJUDSKIH PRAVA I OSNOVNIH SLOBODA?**

Rezime

Ovaj rad se bavi razvojem i izazovima kojima je izložen princip nevraćanja lica u zemlju u kojoj postoji opasnost da će biti izloženo mučenju ili nečovečnom ili ponižavajućem postupanju ili kažnjavanju (princip *non refoulement*) u trenutnoj bezbednosno senzitivnoj klimi. Posebna pažnja će biti posvećena skorašnjim i aktuelnim nastojanjima država da prevaziđu prepreku koju odredba člana 3. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda postavlja u vezi sa uklanjanjem osumnjičenih terorista. Ovo uključuje i razmatranje izazova koji se postavljaju apsolutnoj prirodi zabrane mučenja i nečovečnog ili ponižavajućeg postupanja ili kažnjavanja u vidu nastojanja da se uvede test balansa tj. obaveze razmatranja svih relevantnih faktora prilikom primene ovog člana, kao i pregovaranje i upotrebu diplomatskih garancija.

Ključne reči: ljudska prava, zaštita, zabrana mučenja i nečovečnog ili ponižavajućeg postupanja ili kažnjavanja, Evropski sud za ljudska prava, princip *non refoulement*, nacionalna bezbednost.