

THE EUROPEAN CONVENTION ON HUMAN RIGHTS, COUNTER-TERRORISM, AND REFUGEE PROTECTION

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The legal developments pertaining to the non-refoulement principle under Article 3 of the European Convention on Human Rights provide ample illustration of the dilemmatic relationship between refugee protection and anti- or counter-terrorism measures. Following the terrorist attacks on 11 September 2001 a variety of attempts were made to have the European Court of Human Rights modify its interpretation of Article 3 as providing absolute protection against refoulement. The article depicts these efforts and the intertwined usage of law and policy measures by various actors in the European arena. The Court's response is described and analysed extensively, demonstrating its insistence on fundamental protection principles. However, problems of national security are still perceived as serious by the executive branches of Governments and their security services, resulting in renewed efforts to control the movement and secure expulsion of persons considered dangerous. In that connection, diplomatic assurances have come to play an important role, partly beyond what can be considered sustainable, and thus an issue of further legal disputes.

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1. The delicate problem of absolute protection and effective security measures

The interpretation of Article 3 of the European Convention on Human Rights (ECHR)¹ as a *non-refoulement* norm, as developed by the European Commission of Human Rights and confirmed by the European Court of Human Rights (ECtHR) in the *Soering* Judgment,² has generally been considered as implying complementary protection for asylum-seekers in two different respects: in the definitional sense, due to the potentially wider scope of ill-treatment as well as

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), most recently amended by Protocol No. 14, ETS No. 194, 13 May 2004 (entry into force: 1 Jun. 2010).

² ECtHR, *Soering v. United Kingdom* (Judgment), (7 Jul. 1989), Ser. A no. 161.

the absence of any requirement of particular reasons of the risk of persecution or ill-treatment, as compared to Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention);³ and as a result of the absolute nature of the protection against *refoulement*, as opposed to the exemptions laid down in Article 33(2) of the Refugee Convention. As described in the following, the latter aspect of the complementary human rights protection has been exposed to a variety of challenges resulting from the increased threat of terrorist activities in the aftermath of the 11 September 2001 attacks in the United States (US).

In order to frame the discussion, Section 2 sets out with a presentation of the legal reasoning behind the principle of absolute protection under ECHR Article 3 that was adopted in earlier case law concerning situations of threatening terrorist violence, well before the more recent phenomena of international terrorism. Despite these principled judgments, various attempts have been made to reverse the underlying interpretation of Article 3 against the background of the increased risk of terrorism since 11 September 2001; such attempts have been made both in academic debate, in European Union (EU) policy making, and within the judicial arena of the ECtHR, as described in Section 3 below. In Section 4, the ECtHR's reconfirmation of the interpretation underlying the principle of absolute protection shall be presented; here, in particular, the issue of balancing the risk of ill-treatment against the dangerousness of the deportee to the host society was discussed. As the burden and standard of proof have been suggested as balancing mechanisms, this issue shall be discussed in Section 5. Against this background, Section 6 will comment on diplomatic assurances with a view to widening the perspective by way of comparison to other types of cases raising State security issues, discussing the nature of human rights adjudication in this sensitive area that is often considered particularly "political".

2. Absolute protection under ECHR Article 3 – continuity or evolution?

As early as in the 1991 *Vilvarajah* Judgment, one of the first ECtHR cases concerning protection of asylum-seekers against *refoulement*, the Court observed that Contracting States:

[...] have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens. [...] Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols.⁴

³ Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

⁴ ECtHR, *Vilvarajah and Others v. The United Kingdom* (Judgment), (30 Oct. 1991), Ser. A no. 215, para. 102.

At the same time, however, the Court pronounced the principle that:

[E]xpulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.⁵

Basing itself on the absolute nature of the protection under ECHR Article 3, the ECtHR has held that the principle of *non-refoulement* can be invoked by everyone, irrespective of his or her conduct in the State wanting to expel or deport the person. Interestingly, the interpretation of Article 3 in absolute terms was adopted by the Court with a view to situations of terrorism, initially relating to Convention States' conduct when combating terrorist occurrences within their own territory, and later reiterated in the extra-territorial context of protection against *refoulement*.

The first deportation case raising the issue expressly was *Chahal*, in which the British Government claimed an implied limitation to Article 3 entitling a Contracting State to expel an alien to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. In the alternative, the Government argued that the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3; this approach would take into account that in such cases there are varying degrees of risk of ill-treatment.⁶ The Court rejected this reasoning reiterating that Article 3 enshrines one of the most fundamental values of democratic society. With respect to the threat of terrorism it continued:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention [...] Article 3 (art. 3) makes *no provision for exceptions and no derogation from it is permissible* under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation.⁷

In support of this interpretation of Article 3, the Court referred to two previous judgments concerning threats of terrorist violence, the *Northern Ireland* case

⁵ *Ibid.*, para. 103, referring to *Cruz Varas v. Sweden* (Judgment), (20 Mar. 1991), Ser. A no. 201, paras. 69–70.

⁶ ECtHR, *Chahal v. The United Kingdom* (Judgment), (15 Nov. 1996), Appl. No. 22414/93, paras. 76–77.

⁷ *Ibid.*, para. 79 (emphasis added).

from 1978 and the *Tomasi* case concerning violent separatism in Corsica from 1992.⁸ Against this background, the absolute nature of Article 3 was upheld also in the context of protection against *refoulement*, the Court pronouncing its principled position as follows:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. [...] In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.⁹

Shortly after, the Court confirmed this interpretation of Article 3 in a case concerning the expulsion of a refugee following his conviction of civil crimes.¹⁰ Although the principle of absolute protection against *refoulement* could thus be considered established Strasbourg case law, the principle has been challenged from various sides in the light of the increased threat of terrorist activities since 11 September 2001; while the bombings in Madrid on 11 March 2004 and in London on 7 July 2005 obviously may have given further impetus to the attempts to modify the principle and replace it by more relativist standards, the challenges were actually put on the agenda soon after the 11 September attacks in the US.

3. Challenges to absolute protection in the context of counter-terrorism

3.1. Academic policy-making

In academic debate, the principle of absolute protection against *refoulement* under ECHR Article 3 was questioned already in November 2001. Against the background of the upcoming EU harmonisation of subsidiary protection, Kay Hailbronner referred to the ECtHR's repeated confirmation of "its concept of absolute validity" of ECHR Article 3, stating that it had been applied "even in the case of persons of whom the British authorities assumed with good reasons an affiliation with terrorist activities".¹¹ In Hailbronner's view, the Court's basis

⁸ ECtHR, *Ireland v. The United Kingdom* (Judgment), (18 Jan. 1978), Ser. A no. 25, para. 163; *Tomasi v. France* (Judgment), (27 Aug. 1992), Ser. A no. 241-A, para. 115.

⁹ ECtHR, *Chahal v. The United Kingdom* (Judgment), para. 80.

¹⁰ ECtHR, *Ahmed v. Austria* (Judgment), (17 Dec. 1996), Appl. No. 25964/94.

¹¹ K. Hailbronner, "Principles of International Law Regarding the Concept of Subsidiary Protection", in D. Bouetteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, Brussels, Bruylant, 2002, 11. The book contribution is based on a presentation held at a conference on 16 Nov. 2001, see *ibid.*, xviii.

for extending the absolute character of Article 3 to the duty to grant protection by admitting the person on its territory was “*very doubtful* and hardly in line with the exclusion clause of the *Geneva Convention* and other international instruments excluding from the protection persons having committed serious crimes”.¹²

Hailbronner further argued that recent experiences with international terrorism supported the assumption which was underlying the proposed Directive that there must be a possibility to exclude from subsidiary protection status if security interests of an EU Member State were at stake, “for instance by attachment to a terrorist organisation”. He posited that the ECtHR had not “admitted such an exception even in the case of a terrorist who would declare that he/she should pursue terrorist activities at future occasions at any appropriate time”.¹³

The nature and validity of Hailbronner’s criticism is rather difficult to determine, since he did not clarify the legal sources from which he was drawing the conclusion that the ECtHR interpretation of ECHR Article 3 should be held “doubtful”, nor did he otherwise present the methodological basis of his views. The reference made to the Refugee Convention and “other international instruments” is clearly of little relevance when assessing the manner in which ECHR Article 3 has been and should be interpreted. As it appears above, the ECtHR explicitly stated the difference between the protection against *refoulement* under ECHR Article 3 and that provided by the Refugee Convention,¹⁴ and Hailbronner does not provide any legal arguments demonstrating that the Court’s reasoning behind this statement should be flawed.¹⁵ Bluntly, yet based on the legal sources and arguments presented by himself, Hailbronner’s criticism would seem to be most appropriately characterised as a reflection of wishful legal thinking in the context of EU policy-making, rather than based on sound legal analysis of the interpretation adopted by the ECtHR. While the statements could be seen as successful in the former sense, the legal aspect of his criticism has not resulted in any change of the interpretation. As described below in Section 3.3, however, similar criticism has actually been channelled into the courtroom in Strasbourg.

¹² *Ibid.*, 11 (emphasis added).

¹³ *Ibid.*, 11–12. The proposed Directive to which reference was made, was the Commission’s Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510, 12 Sep. 2001; which led to the adoption of the Qualification Directive 2004/83/EC of 29 April 2004, OJ L 304, 30 Sep. 2004, 12–23. The resulting exclusion clauses in the Qualification Directive are subject to examination, in this special issue, in the contribution of E. Guild & M. Garlick, “Refugee Protection, Counter-Terrorism, and Exclusion in the European Union”.

¹⁴ ECtHR, *Chahal v. The United Kingdom* (Judgment), para. 80 (quoted above at footnote 9).

¹⁵ In the presentation note that was distributed at the conference on 16 Nov. 2001, Hailbronner’s views as referred above were supplemented by the following statement: “The reservation clause [in the Directive proposal, see above n 13] referring to the Member States’ obligations under International Law will probably not be sufficient to bring the exclusion clause as such in line with Art. 3 as it is presently interpreted by the European Court unless the European Court accepts the *better arguments for giving up or distinguishing from its former jurisprudence*.” (K. Hailbronner, Presentation Note, 7; on file with the author (emphasis added)). Still, the better arguments were not elaborated or further explained.

3.2. Diplomatic efforts

Challenges to the principle of absolute protection against *refoulement* under ECHR Article 3 were also made at the political and diplomatic levels. In a governmental policy proposal that was leaked to the media in February 2003 and became famous mainly due to the proposal to send asylum-seekers from EU Member States to processing centres outside the EU, the United Kingdom (UK) Government made the following observations under the heading “Changing the Legislative Basis”:

We would need to change the extra territorial nature of Article 3 if we wanted to reduce our asylum obligations. Article 3 is the only article of ECHR [*sic*], which applies to actions that occur outside the territory of the State. If we only had to concern ourselves with torture, inhuman and degrading treatment that happens in the UK we could remove anyone off the territory without obligation. Coupled with a withdrawal from the Geneva Convention *refoulement* should be possible and the notion of an asylum seeker in the UK should die.

To bring such a change to ECHR [*sic*] we could either seek to *persuade the European Court on Human Rights to change their previous opinion* or we could seek to *renegotiate Article 3* in the Council of Europe. The latter is likely to be more successful although no other European State is yet talking about desisting any such change. If we wanted to make the change unilaterally we would need to repeal the Human Rights Act.

Given the controversial nature of making changes to human rights legislation we are more likely to have success if we sought a more minor change to Article 3. *Rather than completely deny the extra territorial effect of Article 3. We could deny asylum to terrorists by this method saying that terrorists could be removed at least to face inhuman or degrading treatment.* This would actually bring Article 3 into line with the Geneva Convention. It would not reduce the right to asylum for the vast majority but would assist with our security concerns.

The suggested more minor change to Article 3 is *more likely to find favour with the courts than completely removing the right to asylum.* Asylum is an ancient [r]ight that the UK used to honour prior to the Geneva Convention and ECHR. Even if we withdrew from both these instruments the courts may decide that the UK retains its obligation not to return anyone to a place of torture or persecution under common law.¹⁶

¹⁶ UK Government, *New Vision for Refugees*, 7 Mar. 2010, 9, para. 3.3 (emphasis added), available at: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf (last visited 19 Aug. 2010). A draft version of the proposal was leaked to British media early Feb. 2003, see Amnesty International, *UK/EU/UNHCR: Unlawful and Unworkable – Amnesty International’s Views on Proposals for Extra-territorial Processing of Asylum Claims*, IOR 61/004/2003, London, Amnesty International Study, 2003, 1. For a general account of the UK proposal, see G. Noll, “Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones”, *European Journal of Migration and Law*, 5(3), 2003, 303–341.

Although the proposal is rather straightforward as an expression of attempted policy-making, and as such may not need to be subject to analysis from a legal perspective, it should be noted that the British Government already at this stage prepared itself for a kind of two-pronged strategy in the attempt to modify the absolute *non-refoulement* principle under ECHR Article 3. Should it, despite the slightly optimistic tone in that regard, appear impossible to renegotiate Article 3 within the Council of Europe, an alternative strategy would be to seek to persuade the ECtHR to “change their previous opinion” and replace it by more relativist standards for protection against *refoulement*.

The first opportunity to pursue the judicial prong of this strategy turned out to coincide with the British EU Presidency in 2005. Efforts towards some kind of coordinated EU approach to the Strasbourg Court aiming at the reinterpretation of ECHR Article 3 were then prepared at the diplomatic level, by way of persuasion among the EU Member States. At a Council Meeting on Justice and Home Affairs in October 2005, one of the issues discussed under the item “Any other business” was “Article 3 of the European Convention on Human Rights”. Here the UK Presidency “briefed the Council on the UK and Netherlands positions regarding the possibility for the European Court of Human Rights of revisiting an earlier Court decision in the 1996 *Chahal* case”.¹⁷ This cannot be understood to mean anything else than a British – or possibly joint British-Dutch – effort to mobilise support from other Member States for the position they were preparing to argue in the *Ramzy* case that had been lodged with the ECtHR in July 2005; the resulting intervention appeared before the Court a few weeks later.¹⁸

3.3. Judicial efforts

The *Ramzy* case was lodged against the Netherlands in 2005 by an Algerian citizen who was subject to an expulsion order due to his suspected involvement in terrorist activities. In 2002, Ramzy had been arrested and detained on remand on suspicion of participation in the activities of a criminal organization that was pursuing the aims of aiding and abetting the enemy in the conflict in Afghanistan, and which was further involved in drug-trafficking, forgery of travel documents, and trafficking in human beings; along with 11 co-suspects, he was subsequently formally charged with these crimes. The basis of the suspicions was formed by official reports drawn up by the Netherlands Intelligence and Security Service, telephone conversations that had been intercepted by the

¹⁷ Council of the European Union, 2683rd Council Meeting, Justice and Home Affairs, Luxembourg, 12 Oct. 2005, Press Release 12645/05 (Presse 247), 18.

¹⁸ According to a press release issued by the Registrar on 20 Oct. 2005, the ECtHR had granted leave to intervene as a third party in the proceedings of the case to the Governments of Italy, Lithuania, Portugal, Slovakia and the UK, as well as to four NGOs. The four latter Governments submitted their observations on 21 Nov. 2005; see below in Sections 3.3 and 4. Similar comments were submitted by the same four Governments in the case ECtHR, *A. v. The Netherlands* (Judgment), (20 Jul. 2010), Appl. No. 4900/06, paras. 125–130.

Intelligence and Security Service, and books, documents, video and audio tapes that had been found and seized in the course of searches carried out.¹⁹

The Rotterdam Regional Court, however, held that these official reports submitted by the prosecution could not be used as evidence at the trial proceedings, as the Intelligence and Security Service had refused to give evidence about the origins of the information set out in the reports, invoking their obligation to observe secrecy from which the relevant Ministers had not released them for the purpose of giving testimony in the criminal proceedings. As a result, the defence had not been given the opportunity to verify the origins and correctness of the information, and in 2003 the Regional Court therefore acquitted Ramzy of all charges, finding that they had not been legally and convincingly substantiated. The prosecution initially appealed against this Judgment, but withdrew the appeal in September 2005 before the trial proceedings had commenced.²⁰ After his release from pre-trial detention in 2003, Ramzy had filed a third asylum application in the Netherlands; like the two previous applications, it was rejected. Based on official reports from the Intelligence and Security Service, an exclusion order was issued by the Immigration Minister in 2004, holding that Ramzy posed a threat to national security and that imposing an exclusion order on him was in the interests of the Netherlands' international relations.²¹

Following unsuccessful appeal and injunction cases in the Dutch court system, Ramzy lodged an application with the ECtHR in 2005. He argued that the Algerian authorities were aware of the nature of the suspicions having arisen against him in the Netherlands, and that various reports on Algeria were confirming that in particular persons suspected of involvement with Islamic extremism risk ill-treatment or torture at the hands of the Algerian authorities. Ramzy, therefore, complained that if expelled to Algeria, he would be exposed to a real risk of treatment contrary to ECHR Article 3; he further complained under Article 13 in conjunction with Article 3 that he did not have an effective remedy against the exclusion order imposed on him in the Netherlands.

While the Netherlands' Government acknowledged, and had no desire to challenge, the absolute nature of ECHR Article 3,²² four other Governments intervened in order to have the Court "alter and clarify" the approach followed in *refoulement* cases under Article 3 concerning the threat created by international terrorism.²³ Ramzy's application was declared admissible by the ECtHR in May 2008,²⁴ but the Judgment was not delivered until July 2010. Here it was decided to strike the case out of the list because the Court concluded that it was

¹⁹ ECtHR, *Ramzy v. The Netherlands* (Decision), (27 May 2008), Appl. No. 25424/05, para. 13.

²⁰ *Ibid.*, paras. 15–17.

²¹ *Ibid.*, paras. 26, 41.

²² *Ibid.*, para. 100; the alternative approach suggested by the Netherlands will be discussed below in Section 5.1.

²³ *Ibid.*, para. 130; see below Section 4.

²⁴ *Ibid.*, para. 141.

no longer justified to continue the examination of the application, and found no reasons of a general character to do so. The reason for this conclusion was the applicant's failure to keep his representatives informed of his whereabouts or at least of means to contact him, which in the Court's view must be taken as indicating that he has lost interest in pursuing the application.²⁵ This should probably be seen against the background of information from the Netherlands' Government that submitted to the ECtHR, official reports from 2006 and 2008 drawn up by the Netherlands Intelligence and Security Service, according to which it appeared from "information from reliable sources" that Ramzy was or had been staying in Algeria and had "made a normal life for himself there".²⁶

4. Reconfirmation of the principle of absolute protection

While the *Ramzy* case was still pending in Strasbourg, the four intervening Governments' arguments had been essentially rejected by the ECtHR Grand Chamber in its Judgment in another case in which the UK Government had intervened and presented legal observations similar to those submitted in collaboration with the three other Governments in *Ramzy*. In the *Saadi* case, the Tunisian applicant had been arrested in Italy in 2002 and subsequently prosecuted for involvement in international terrorism; in 2005 he was convicted for parts of the charges and sentenced to 4 years and 6 months imprisonment. After his release in 2006, an order was issued for his deportation to Tunisia.²⁷ There he had been sentenced *in absentia* to 20 years of imprisonment for membership of a terrorist organization operating abroad in time of peace, and for incitement to terrorism.²⁸ In his complaint to the ECtHR, Saadi argued that it was "a matter of common knowledge" that persons suspected of terrorist activities, in particular those connected with Islamist fundamentalism, were frequently tortured in Tunisia; consequently, he submitted that enforcement of his deportation order would expose him to the risk of treatment contrary to ECHR Article 3.

Also in this case, the UK Government intervened as a third party in order to have the ECtHR "alter and clarify" the approach followed by the Court since *Chahal*²⁹ in expulsion cases under Article 3 concerning the threat created by international terrorism. The UK Government argued the need to reconsider the Court's principle that in view of the absolute nature of Article 3, the risk of treatment contrary to this provision could not be weighed against the reasons put forward by a State to justify expulsion, including the protection of national security. Because of its "rigidity", the principle had caused many difficulties

²⁵ ECtHR, *Ramzy v. The Netherlands* (Judgment), (20 Jul. 2010), Appl. No. 25424/05, paras. 64–65.

²⁶ *Ibid.*, paras. 55, 59.

²⁷ ECtHR, *Saadi v. Italy* (Judgment), (28 Feb. 2008), Appl. No. 37201/06, paras. 11–14 and 31–34.

²⁸ *Ibid.*, para. 29.

²⁹ ECtHR, *Chahal v. The United Kingdom* (Judgment).

for the Contracting States by preventing them in practice from enforcing expulsion measures.³⁰

More specifically, the UK Government held that, while it was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 was absolute, in the event of expulsion, the treatment would be inflicted not by the signatory State but by the authorities of another State. The signatory European State was then, according to the intervener, bound by a “positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of *implied positive obligations* the Court had accepted that the applicant’s rights must be weighed against the interests of the community as a whole.”³¹ The UK Government further argued that this interpretation did not reflect a universally recognized moral imperative, and that it was in contradiction with the intentions of the original signatories of the ECHR. Thus, the threat presented by the person to be deported should be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment; that would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 against those secured to all other members of the community by Article 2.³²

In addition, the UK Government argued that national security considerations must influence the *standard of proof* required from the applicant in expulsion cases. If the respondent State adduced evidence that there was a threat to national security, stronger evidence would have to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country; in particular, the applicant must then prove that it was “more likely than not” that he would be subjected to treatment prohibited by Article 3. Finally, the UK emphasised the possibility for Contracting States to obtain *diplomatic assurances* from the receiving State.³³

The respondent Italian Government declared at the Court hearing to agree in substance with the arguments advanced by the UK.³⁴ Apart from that, the Italian Government had focused little on the principled issues concerning the interpretation of ECHR Article 3. Instead, it argued that it was “necessary in the first place to provide an account of the background to the case”; after the 11 September 2001 attacks in the US, the Italian police had been tipped off by intelligence services and uncovered an international network of militant Islamists, mainly composed of Tunisians, and placed it under surveillance.³⁵ Furthermore, the Italian Government had questioned the reality of the risk of ill-treatment in Tunisia, and made reference to the diplomatic assurances in

³⁰ ECtHR, *Saadi v. Italy* (Judgment), para. 117.

³¹ *Ibid.*, para. 120 (emphasis added).

³² *Ibid.*, para. 122.

³³ *Ibid.*, paras. 122–123.

³⁴ *Ibid.*, para. 115.

³⁵ *Ibid.*, paras. 102–104.

which the Tunisian Government had given an “undertaking to apply in the present case the relevant Tunisian law [...] which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner’s lawyer and family”.³⁶

Neither the respondent nor the intervening Governments succeeded in persuading the ECtHR to reinterpret Article 3 in order to modify the absolute protection against *refoulement*. The Grand Chamber restated the general principles of States’ responsibility in the event of expulsion, including the absolute prohibition under ECHR Article 3, irrespective of the victim’s conduct, while noting:

[...] first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence [...]. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.³⁷

The ECtHR then took issue with the line of reasoning suggested by the intervening UK Government:

Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole [...]. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule [...]. It must therefore reaffirm the principle stated in the *Chahal* judgment [...] that it is *not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion* in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees [...]. Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism [...].

³⁶ *Ibid.*, paras. 105–114 and 116.

³⁷ *Ibid.*, paras. 124–127 and 137.

The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. *The concepts of “risk” and “dangerousness” in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other.* Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test. [. . .]

The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.³⁸

Subsequent judgments have reiterated the principled position here pronounced by the ECtHR Grand Chamber towards the various challenges to the absolute nature of the protection under ECHR Article 3.³⁹ Thus, it is safe to conclude that the Court has not been prepared to modify the interpretation according to which protection against *refoulement* under Article 3 is absolute, despite the strong assertions of national security considerations that have been presented by some European States.⁴⁰

5. Standard of proof and other mechanisms of relativist protection

5.1. Enhanced burden of proof – individualised risk?

In the *Ramzy* case discussed above in Section 3.3, the Netherlands' Government submitted that they acknowledged and had no desire to challenge the absolute nature of ECHR Article 3.⁴¹ Rather, insisting on the undeniable interest in the

³⁸ *Ibid.*, paras. 138–139 and 141 (emphasis added).

³⁹ See, as clear examples, ECtHR, *Muminov v. Russia* (Judgment), (11 Dec. 2008), Appl. No. 42502/06, para. 89; *Ben Khemais v. Italy* (Judgment), (24 Feb. 2009), Appl. No. 246/07, para. 53; *O. v. Italy* (Judgment), (24 Mar. 2009), Appl. No. 37257/06, para. 36; *Abdolkhani and Karimnia v. Turkey* (Judgment), (22 Sep. 2009), Appl. No. 30471/08, para. 91; *A. v. The Netherlands* (Judgment), (20 Jul. 2010), Appl. No. 4900/06, paras. 141–143.

⁴⁰ See D. Moeckli, “*Saadi v. Italy*: The Rules of the Game Have Not Changed”, *Human Rights Law Review*, 8(3), 2008, 534–548.

⁴¹ ECtHR, *Ramzy v. The Netherlands* (Decision), para. 100.

applicant's expulsion, the Netherlands underlined the need to "adhere strictly to the criterion laid down by the Court that an applicant must submit evidence that he or she *personally* has a well-founded fear of being subjected to treatment contrary to Article 3". The Government further argued that adhering strictly to this burden of proof was all the more important in cases where national security interests were at stake, as in such cases the *positive obligation* of Contracting States under ECHR Article 2 to take all reasonable preventive action to protect its residents from life-threatening situations also came into play.⁴²

Although not disputing as such the principle of absolute protection against *refoulement*, this line of reasoning appears to be effectively suggesting a relativist approach in cases where the expelling State invokes reasons of national security in order to justify expulsion. Thus, in both *Ramzy* and *Saadi* the intervening Governments argued in a similar manner that national security considerations ought to influence the *standard of proof* required from the applicant in expulsion cases; in case of evidence of a threat to national security, stronger evidence would have to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country, and the applicant must then prove that it was "more likely than not" that he would be subjected to ill-treatment.⁴³ The ECtHR Grand Chamber rejected these arguments in the following terms:

With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment [...], the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3. [...]⁴⁴

Aside from the formal difference between standard and burden of proof in evidentiary theory which is probably immaterial in this regard, the effect – and perhaps the intention – of such differentiated requirements of evidence would most likely be an indirect exercise of balancing the assumed risk of

⁴² *Ibid.*, paras. 104–105.

⁴³ *Ibid.*, para. 130; ECtHR, *Saadi v. Italy* (Judgment), para. 122; see also above text at footnote 33.

⁴⁴ ECtHR, *Saadi v. Italy* (Judgment), para. 140.

ill-treatment against the perceived threat to national security. This potential of the differentiation of the evidence required to establish a real risk of ill-treatment might be increased by the additional requirement of proof that the individual be *personally* at risk, as suggested by the Netherlands' Government; this might imply some kind of *individualisation* requirement under ECHR Article 3 that has otherwise been rejected by the ECtHR.⁴⁵ Thus, by combining the standard of proof and the issue to be proven, the decision-making authorities would have even wider scope of manoeuvre for introducing security considerations in disguise, tacitly influencing the threshold to be met by the applicant for protection; notably, decisions based on such balancing would be difficult, if not impossible, to challenge in judicial review, as they could often be argued not to concern the interpretation of the ECHR or other issues of law.

5.2. Implied positive obligations – balanced considerations?

The views expressed by Governments in the cases discussed above may invite for further comments, in addition to the legal reasoning pronounced by the ECtHR in the judgments that rejected the suggested modification of the absolute nature of protection under ECHR Article 3. In particular, the introduction by the intervening Governments in *Ramzy* and *Saadi* of the notion of *implied positive obligation* under Article 3 is a bit confusing. While the interpretation extending the scope of Article 3 to include the foreseeable consequences of a Contracting State's exercise of jurisdiction, even if such consequences occur outside its territory under the jurisdiction of another State – i.e. the interpretation implying the principle of *non-refoulement* under Article 3 – can indeed be considered an example of the ECtHR's dynamic or evolutive method of interpretation, it is hard to see how it could involve any positive obligation. Contracting States are able to fulfil their obligations under Article 3 in this regard by simply staying passive, refraining from carrying out the disputed measure of expulsion.

On the contrary, it is not hard to see the strategic advantage of the notion suggested by the intervening Governments, as it was introduced in order to justify the balancing exercise they argued to be permissible under Article 3. Thus, in the document submitted to the ECtHR, the four Governments first argued that:

[R]eliance on Article 1 of the Convention is needed in order for the responsibility (not to expose a person to the risk of ill-treatment) to be engaged. The engagement of responsibility is therefore *analogous to a positive obligation* to prevent Article 3 ill-treatment.⁴⁶

⁴⁵ ECtHR, *Salah Sheekh v. The Netherlands* (Judgment), (11 Jan. 2007), Appl. No. 1948/04, para. 148; *NA. v. The United Kingdom* (Judgment), (17 Jul. 2008), Appl. No. 25904/07, paras. 115–117; see on “individualisation”, J. Vedsted-Hansen, “European *non-Refoulement* Revisited”, *Scandinavian Studies in Law*, 55, 2010, 275–282.

⁴⁶ ECtHR, *Ramzy v. The Netherlands* (Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom), (21 Nov. 2005), Appl. No. 25424/05, para. 10.2 (emphasis added).

Later, this view was phrased slightly differently as “an obligation that is (a) inherent or implied and not express and (b) in substance a positive obligation (or at least *closely analogous* to one).⁴⁷ The legal implications were then presented in the following reasoning:

Inherent or implied obligations have consistently been recognised as permitting *implied limitations* if warranted having regard to the context and case. Positive obligations have also consistently been treated as involving a *balanced consideration* of all the circumstances and an assessment of how it would be reasonable for a Contracting State to act [...].⁴⁸

The notion of a balanced consideration of “all the circumstances” is in itself noteworthy. This was further developed by the intervening Governments stressing that they did not submit that national security considerations will inevitably permit removal of persons believed to present a threat to national security. Rather, “national security considerations cannot be dismissed as irrelevant, and may be taken into account [...]. A considered judgement, weighing all the circumstances, would need to be made in any particular case”.⁴⁹ The problem with this reasoning is that it is difficult to reconcile with the very reason given for the need to allow Contracting States to expel persons considered a threat to national security, namely the insufficiency of having recourse to criminal sanctions against the terrorist suspects, as it could prove difficult to establish involvement in terrorism beyond reasonable doubt due to the frequent impossibility of using confidential sources or information provided by intelligence services.⁵⁰ Since evidence cannot be provided in domestic court proceedings, how would it apparently be possible for the purpose of “weighing all the circumstances [...] in any particular case”? In any event, the difference between the two types of cases was not clarified, and the resulting possibility to produce evidence in the latter type has not been demonstrated persuasively.

6. Human rights in security-related cases – law or policy?

An issue that has attracted much attention in the context of protection against *refoulement* in cases involving national security considerations is the notion of *diplomatic assurances* from the receiving State, allegedly obviating the risk of ill-treatment of the person upon expulsion. While such assurances raise complex problems beyond the scope of this article, the notion does illustrate wider perspectives of cases concerning State security and the potential conflict between State security and human rights protection.

⁴⁷ *Ibid.*, para. 25.1 (emphasis added).

⁴⁸ *Ibid.*, para. 25.1 (emphasis added).

⁴⁹ *Ibid.*, para. 29.

⁵⁰ ECtHR: *Ramzy v. The Netherlands* (Decision), para. 126; *Saadi v. Italy* (Judgment), paras. 117–118; Observations (footnote 46 above), para. 14.

The existence of a diplomatic assurance was invoked by the Italian Government in the *Saadi* case. Yet, its relevance and persuasive force was rejected by the ECtHR in the following terms that amply illustrate the legal problems inherent in obtaining diplomatic statements in sensitive cases:

The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian Government asked the Tunisian Government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention [. . .]. However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad [. . .]. It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions" [. . .]. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are *not in themselves sufficient to ensure adequate protection against the risk of ill-treatment* where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would *not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee* that the applicant would be protected against the risk of treatment prohibited by the Convention [. . .]. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.⁵¹

More fundamentally, one Government's invocation of assurances obtained by diplomatic negotiations with another Government can be seen as an attempt to redefine human rights protection into a political issue; or as repoliticisation of human rights by way of moving their protection and shifting power from the legal or judicial sphere to that of diplomacy and transnational security networking, despite the fact that diplomatic assurances must be considered legally binding on the States having entered into the diplomatic exchange resulting in the assurance.⁵² In this sense, the notion of diplomatic assurances may be seen as a

⁵¹ ECtHR, *Saadi v. Italy* (Judgment), paras. 147–148 (emphasis added); reference was here made to the Court's previous statements in *Chahal v. The United Kingdom* (Judgment), para. 105.

⁵² See G. Noll, "Diplomatic Assurances and the Silence of Human Rights Law", *Melbourne Journal of International Law*, 7(1), 2006, 112–114 and 119–120.

parallel of counter-terrorism to the more traditional phenomenon of derogations from human rights norms, as stipulated by ECHR Article 15 and similar provisions in other human rights treaties. According to these provisions, the precondition for suspending certain human rights will normally be the existence of a situation of “war or other public emergency threatening the life of the nation”.

Governments’ decisions to derogate from human rights obligations under such exceptional circumstances have traditionally been considered as being of “political character” or “essentially political”.⁵³ In a similar manner, their attempts to enhance the prospects of expulsion of aliens considered a threat to national security may perhaps be perceived as political or politically bound. Admittedly, not only the assessment of the individual as being dangerous to national security, but also the decision to enter into diplomatic negotiations in order to obtain assurances from another Government that it will not violate human rights obligations normally already undertaken under international treaties, may appear troublesome if made subject to judicial review. Nonetheless, important constitutive elements of such decisions and diplomatic agreements are legally relevant and governed by legal norms, and should accordingly be treated as legal measures even in the sense of being exposed to appropriate control by independent bodies with access to the relevant information and competence to consider all the circumstances and aspects of these measures.

Technical as well as principled problems in that connection cannot be ignored; yet even imperfect solutions would seem preferable to the risk inherent in deference to executive powers or political prerogatives. Despite the various, and certainly not trivial, attempts to have the ECtHR modify its principled position on the protection against ill-treatment under ECHR Article 3, the Court has so far resisted the pressure; thus, not accepting that national security issues should be beyond the scope of legal norms and judicial control, to some extent similar to the approach taken by the ECtHR towards derogation decisions invoking exceptional circumstances of national security.⁵⁴ Although States’ margin of appreciation will often be widened, in terms of assessing evidence or balancing various interests and considerations, State security does not suspend judicial review and cannot trump fundamental human rights obligations.

Some European States seem prepared to strike back, however. While the Court’s approach to the assessment of diplomatic assurances can be considered pragmatic, yet critical, the practice of reliance or at least invocation of such diplomatic exchanges seems to be ongoing. Recent cases have demonstrated

⁵³ M. O’Boyle, “The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?”, *Human Rights Law Journal*, 19(1), 1998, 23–29.

⁵⁴ See, as a recent and important example, ECtHR, *A. and Others v. The United Kingdom* (Judgment), (19 Feb. 2009), Appl. No. 3455/05.

occurrences of governmental disobedience towards the clear rulings of the ECtHR;⁵⁵ hence, the dilemmatic relationship between law and policy persists, and the shifting of power to the executive and security sphere invites for continued legal and academic attention.

⁵⁵ ECtHR, *Ben Khemais v. Italy* (Judgment), (24 Feb. 2009); *Trabelsi v. Italy* (Judgment), (13 Apr. 2010), Appl. No. 50163/2008.