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# In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed

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**Abstract**
According to well-established case law of the European Court of Human Rights, the prohibition on expulsion resulting in ill-treatment under Article 3 of the European Convention on Human Rights is 'absolute': it does not allow for balancing of interests. Analysis of the Court's case law, however, shows that the application of the provision involves various forms of balancing, for example when delimiting the burden of proof or qualifying an act as ill-treatment. The absolute character expresses a value judgement about the importance of the prohibition, and it serves as an argumentative tool applied to sustain wide or inclusive readings of Article 3 ECHR.

**Key words**
absoluteness; argumentative patterns; European Court of Human Rights; human rights law; prohibition of refoulement

The European Court of Human Rights consistently holds that the prohibition on ill-treatment in Article 3 of the European Convention on Human Rights (ECHR) is 'absolute', which entails that it does not allow for balancing against other interests such as national security. This applies also in expulsion cases. For example, an alien who poses a terrorist threat to a state party to the Convention cannot be expelled, if there is a real risk that he will be subjected to ill-treatment in the country of destination.[1] Some cases, however, seem to imply that Article 3 ECHR does allow for balancing, at least in certain respects.[2] This begs the question of what exactly the Court means when it says that Article 3 is absolute.

In this article I discuss the meaning and content of the concept of 'absoluteness' as it is employed by the European Court of Human Rights, by means of a detailed analysis of its case law. The analysis focuses on the consistency in the reasoning of the Court in two respects. First, for assessment of the Court's reasoning, its own standards should be applied. According to well-established case law[3] the Court

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1 *Saadi v. the United Kingdom*, Judgment of 28 February 2008, [2008] ECHR.

2 E.g. *N. v. the United Kingdom*, Judgment of 27 May 2008, [2008] ECHR.

3 *Golder v. UK*, Judgment of 21 February 1975, [1975] ECHR, (Ser. A vol 18), at. 29; *Banković et al. v. Belgium et al.*, Judgment of 12 December 2001, [2001] ECHR, Rep. 2001-XII, at 55 f.

should interpret the Convention in accordance with the Vienna Convention on the Law of Treaties (Vienna Treaty Convention, VTC) rules on treaty interpretation: the meaning of a provision must be established on the basis of its wording, object and purpose, and context, relevant rules of international law included.[4] As much as possible arguments are classified in terms of these rules. The VTC rules may in themselves hardly be said to point in one direction – for example, emphasis on the wording of a provision may lead to a narrow interpretation, emphasis on object and purpose to a wide one. This indeterminacy can at least partially be solved by following the Court's own approach. If it attaches a certain weight to a certain contextual argument in one line of argument, this context should be assessed in the same way in another case. Thus discussion of the Court's case law in terms of its application of the interpretation rules and its assessment of relevance of means of interpretation amounts to an analysis of its consistency in applying them.[5] Second, I shall analyse the schemes of argumentation used by the Court. In some cases, these schemes are made explicit by the Court in leading cases. In other cases, the argumentation is somewhat hidden but can be clarified by comparison with schemes used in cases that do not concern expulsion. This in fact amounts to discussion of the consistency of the use of argumentation schemes.

The analyses described above will show that for some aspects of the prohibition of *refoulement* explicit arguments or grounds have been put forward, but not for other aspects, and that the prohibition of *refoulement* can be phrased in a different way from that in which the Court has done, yielding the same result as regards application. I shall discuss the effects of stating explicit grounds for one aspect and not the other, and of the various phrasings of the prohibition, and argue that certain phrasings, in particular the label 'absolute', are used for rhetorical effect.

## 1. *Saadi* v. *Italy* and *N* v. *UK*: absoluteness reaffirmed and denied

The absolute nature of the prohibition on torture and inhuman and degrading treatment or punishment laid down in Article 3 ECHR is a well-established tenet. According to settled case law of the European Court of Human Rights, the prohibition is 'absolute' in the sense that interests of other individuals or societal interests cannot serve as grounds for limiting or derogating from this right not to be ill-treated. This holds true also if a state wants to deport an alien who poses a terrorist threat, so the Court ruled in *Chahal*:

> The prohibition provided by Article 3 against ill-treatment is . . . 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,

4 See Articles 31 and 32 VTC, Vienna Convention on the Law of Treaties of 24 May 1969, 1155 UNTS 331.

5 A more extensive discussion of how I think the VTC rules should be understood and applied can be found in H. Battjes, *European Asylum Law and International Law* (2006), 14–25.

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> the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[6]

Accordingly, there is no 'room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged'.[7] In its recent judgment *Saadi* the European Court confirmed in an explicit and forceful manner this absolute prohibition on expulsion in case of risk of ill-treatment.[8]

This absolute nature of Article 3 stands in marked contrast to most other provisions of the European Convention. Article 8, for example, requires states to respect 'family life'. This duty to respect entails that states cannot expel a person, if expulsion has adverse effects on their family life. However, this prohibition is not absolute – the second paragraph of Article 8 explicitly allows for exceptions to this right to respect for family life for reasons of (among other things) national security and public order. Hence foreigners who have committed serious offences can be expelled, even if expulsion means that they will not be able to see their spouse or children. In such cases the expellee's right to respect for his family life is balanced with other, societal interests (e.g. the right to be protected from terrorist activities).

Thus the Court's case law implies a clear opposition between the unqualified right not to be ill-treated as protected by Article 3 ECHR, and the qualified right to respect for one's family life as protected under Article 8 ECHR. The former is absolute, which entails that no balancing with other interests is allowed; the latter allows for such balancing. However, another strand of Strasbourg case law on Article 3 blurs this clear distinction; it seems to imply that Article 3 ECHR may allow for balancing of interests. An example is *N* v. *UK*. This case concerned an HIV-positive Ugandan woman, whose health would deteriorate dramatically if she were expelled to her country of origin. It is well-established case law that if expulsion has very severe health consequences, it amounts to inhuman or degrading treatment as meant in Article 3 ECHR, and the Grand Chamber so confirmed in *N* v. *UK*.[9] One would assume that competing interests were hence irrelevant. But the Court did not refer to the 'absolute nature' of Article 3; instead, it remarked that

> [I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights . . . Article 3 does not place an obligation on the Contracting State to [provide for] free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.[10]

Here, the state's financial burdens appear to be relevant for deciding whether or not expulsion is allowed for. If the case were considered under Article 8 ECHR, this would not be surprising – that provision allows for interferences in the right

6 *Chahal v. the United Kingdom*, Judgment of 15 November 1996, [1996] ECHR, Rep 1996-V, at 80.
7 Ibid., at 81.
8 *Saadi*, *supra* note 1.
9 *N v. UK*, *supra* note 2, at 42.
10 Ibid., at 44.

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to family or private life for the purpose of the state's economic well-being. But how could this ruling be accommodated with the 'absolute character' of Article 3 ECHR, confirmed in *Saadi* only a few months before?

In this article, I discuss the absolute nature of Article 3 ECHR in expulsion cases similar to *Saadi*. I am concerned with the question of what it means when the Court states that the prohibition of *refoulement* in Article 3 ECHR is absolute. Does it mean that the applicant's interests cannot be and are not balanced with any other interest? Or that only the conduct of the applicant (such as his involvement in terrorist activities) can never be relevant for the application of the prohibition? Or that this conduct is not relevant in only certain respects, but informs the application of the prohibition in other respects? Or that the designation as absolute is a mere rhetorical device, devoid of any legal meaning? In order to see, I shall discuss the case law of the European Court of Human Rights on the matter. I shall first explore the Court's grounds for assuming that balancing is never allowed, and then address in some detail the reasons proposed by the UK government in *Saadi* v. *Italy* why, in its view, national security interests should inform application of the prohibition of *refoulement*. At times I restate the arguments put forward for and against balancing in order to make them as strong as possible. On the basis of this analysis, I shall argue that the application of the prohibition of *refoulement* always involves some form of balancing, and that reference to the 'absolute nature' serves to emphasize the interests of the individual opposing expulsion.

What this article is not about. Similar issues arise as regards the absolute prohibition of torture and cruel, inhuman, and degrading treatment in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), the prohibition of expulsion in case of danger of torture upon expulsion in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, CAT) – and, arguably, any prohibition or requirement that is said to be 'absolute'. Nevertheless, the discussion in this paper is limited to the case law of the Strasbourg Court. No other international body has dealt with the issue as extensively. The notion of absoluteness and its implications do figure in the views of UN treaty-monitoring bodies such as the Human Rights Committee and the Commission against Torture, but their views on the matter are fewer in number and not as comprehensive as the judgments of the European Court of Human Rights. Similarities in approach between Strasbourg case law and those views are briefly addressed at the end of this article. Furthermore, although occasionally case law on domestic Article 3 cases and cases under other provisions is taken into account, this article does not endeavour to make a point on issues of law other than the prohibition of expulsion under Article 3 ECHR. Nor does it endeavour to discuss whether or not public order and national security considerations *should* play a role in case law on expulsion. This article is limited to discussing the argumentation of the Court as regards the absolute nature of Article 3 ECHR in expulsion cases.

Finally, a few remarks on terminology may be helpful. 'Ill-treatment' is used as a shorthand term for treatment proscribed by Article 3. The term 'domestic case' is applied to cases where the ill-treatment has been or will be inflicted within the jurisdiction (for present purposes, on the territory) of the contracting state

concerned, 'expulsion case' when the ill-treatment occurred or will occur outside that jurisdiction (regardless of whether the removal concerns expulsion of failed asylum seekers, or extradition or removal otherwise). The term 'prohibition of *refoulement*' is applied as shorthand for the 'prohibition to expel a person to a country where substantial reasons have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 ECHR'.

## 2. The absolute nature of Article 3 ECHR

In this section I shall discuss the Court's arguments for stating that the prohibition of *refoulement* is absolute. These arguments can be divided in three groups: first, arguments deriving from the text of the Convention which the Court developed in domestic cases and applied also to expulsion cases (section 2.1); second, arguments for the absolute nature of Article 3 ECHR in other sources of international law (section 2.2); third, arguments that apply to the prohibition of *refoulement* under Article 3 ECHR in particular (section 2.3).

### 2.1. The text of the Convention

Why is the prohibition of *refoulement* under Article 3 ECHR 'absolute', and what does this absoluteness entail? The reasoning of the Court is, basically, as follows. Under most other substantive provisions of the European Convention on Human Rights and its Protocols, an interference with the right concerned – for example, the right to privacy under Article 8 ECHR – is allowed for if it meets the requirements set out in the limitation clause: if it is foreseen by law, serves a legitimate aim, and is necessary in a democratic society. This last requirement entails *inter alia* that the interference corresponds to a pressing social need and is proportionate to the aim pursued. So the application model is, first, qualification of the act complained of as an interference with the right concerned, and second, decision whether the interference is justified under the terms of the Convention.

In contrast, this balancing is not allowed under Article 3 ECHR. This prohibition is absolute, according to the European Court of Human Rights, because the text of the provision 'makes no provision for exceptions'.[11] This feature (a textual argument) is highlighted by contrast with other Convention provisions (in VTC terms, by a contextual argument): Article 3 is '[u]nlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4',[12] which contain limitation clauses as Article 8 does. Furthermore, 'no derogation from [Article 3] is permissible under Article 15'.[13] This provision states that states may derogate from most Convention provisions in times of emergency, but not from a selected group of provisions, among them Article 3.

Hence the application model consists of one step only: qualification as torture or inhuman or degrading treatment or punishment. The second step and the question

11 Cf. *Ireland v. United Kingdom*, Judgment of 18 January 1978, [1978] ECHR, (Ser. A25), at 162.
12 Cf. ibid., at 163; *Saadi*, *supra* note 1, at 127.
13 Ibid.

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whether some competing interest could justify interference cannot come into play. 'Absolute' thus appears to mean absence of the possibility of justifying interferences.

Is this reasoning conclusive? The absence of a limitation clause is a formal feature that does not, or does not necessarily, warrant the conclusion that states are precluded from limiting the right concerned. For example, Article 6 (right to fair trial) does not contain a limitation clause. Nevertheless,

> [t]he right of access to a court is not . . . absolute, but may be subject to limitations. [Limitations] are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[14]

Nor does Article 15 warrant the conclusion that Article 3 does not implicitly allow for limitations. According to Article 15(1), '[i]n time of war or other public emergency threatening the life of the nation', a state 'may take measures derogating from its obligations under this Convention' (certain conditions fulfilled). Article 15(2) merely states that 'no derogation from Article . . . 3 . . . shall be made under this provision'. Emergency situations do not affect the protection afforded by the provision. Therefore the provision does not allow for conclusions as to whether implied limitations to Article 3 ECHR are allowed.

In a number of cases the Court pointed in this context to another feature of Article 3: it 'enshrines one of the fundamental values of democratic societies'.[15] How do we know that Article 3 has this fundamental importance, in contrast to the apparently less fundamental right to fair trial (or other derogable Convention rights)? In *Soering*, the Court reasoned that this 'absolute prohibition . . . *shows* that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[16] This is circular reasoning: it amounts to stating that Article 3 does not allow for limitations or derogations because it is fundamentally important, and this fundamental importance follows from the absence of a limitation clause.[17] That non-derogability does not necessarily prove fundamental importance is illustrated by a comparison with other human rights conventions that list more non-derogable provisions than the European Convention. Article 18 of the American Convention on Human Rights (ACHR) grants in non-derogable terms the right to have a name. As Seiderman argues, the absence of a limitation clause may show that the framers of the American Convention could not conceive of a reasonable basis for limiting this right, not that the right was so fundamental.[18]

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14 *Al-Adsani v. UK*, Judgment of 21 November 2001, [2001] ECHR, Rep. 2001-XI, at 53.
15 *Chahal*, *supra* note 6; *Saadi*, *supra* note 1, at 127.
16 *Soering v. the United Kingdom*, Judgment of 7 July 1989, [1989] ECHR (Ser A 161), at 88 (emphasis added).
17 G. Noll, *Negotiating Asylum* (2000), 461 (referring to other authors).
18 D. Seidermann, *Hierarchy in International Law – The Human Rights Dimension* (2001), 77–8.

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In sum, according to the Court, Article 3 is absolute: it allows for no limitation or derogation. This follows from text and context elements. As argued above, text and context do not in themselves warrant this conclusion. The absolute nature further follows from the 'fundamental importance' of Article 3, a quality that cannot logically be derived from the Convention text. Arguably, it expresses a value judgement.

### 2.2. External arguments

The arguments for the absolute nature of Article 3 hitherto mentioned are all internal to the European Convention. In *Soering*, the Court adduced an external argument for this absolute nature: it based it on international law, in terms that remind of *jus cogens*.

Peremptory norms, or *jus cogens*, are norms that may not be trumped by other rules which are not peremptory themselves.[19] According to Article 53 VTC, a peremptory norm is a norm (i) of general international law accepted and recognized by the community of states as a whole, (ii) from which no derogation is permitted.[20] The ILC commentary on the draft for the provision clarifies that it is 'the particular nature of the subject-matter with which it deals that may . . . give [the norm] the character of *jus cogens*'.[21] This means that only norms that are deemed to be fundamentally important are accepted as *jus cogens*.[22]

#### *2.2.1.* Jus cogens*:* Soering

*Soering* was the first case in which the Court addressed the question of whether Article 3 prohibits expulsion if it is foreseeable that the expellee will be subjected to ill-treatment after the expulsion. The case concerned a German national, Jens Soering, who murdered the parents of his girlfriend in Virginia, in the United States. He then fled to the United Kingdom, which decided to extradite him to the United States. Soering stated that it was likely that he would be condemned to death in Virginia. As a consequence, he would have to spend years on death row awaiting execution, which amounted to ill-treatment.

Addressing the 'absolute' nature of Article 3 ECHR, the Court first reiterated the arguments stated before in domestic cases discussed above: 'Article 3 makes *no provision for exceptions* and *no derogation* from it is permissible under Article 15 in time of war or other national emergency', and then continued:

> This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines *one of the fundamental values of the democratic societies making up the Council of Europe*. It is also to be found in similar terms in other international instruments such as the 1966

19 Ibid., at 36.

20 Art. 53 VTC entails that not even the 'international community of states' can modify a *jus cogens* rule by means of *jus dispositivum*, that is, by general international law that does not possess peremptory character. For identification of *jus cogens* norms this requirement has no meaning next to the non-derogability requirement.

21 *ILC Yearbook* 2 (1966), at 247–8, quoted by Seidermann, *supra* note 18, at 45.

22 Seidermann, *supra* note 18, at 85.

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> International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is *generally recognized as an internationally accepted standard.*[23]

What exactly do the observations on Article 7 ICCPR and Article 5(2) ACHR contribute to the determination of the meaning of Article 3 ECHR? That both prohibitions of ill-treatment do not allow for limitation does not add to our insight, as this already follows from Article 3 ECHR itself. The reference to the Covenant and the American Convention rather seems to serve another purpose. Lawson observes that the Court seems to allude to the existence of a general rule of *jus cogens*: 'in similar terms', that is, in non-derogable terms, the prohibition has been 'generally recognized as an internationally accepted standard'. This follows from Article 7 ICCPR; the ACHR as well as Article 3 ECHR feature as regional codifications. True, the Court did not state in so many words that Article 3 ECHR is *jus cogens*, nor did it state that Article 3 ECHR has precedence over the competing extradition agreement between the United Kingdom and the United States, although such precedence is one of the most important characteristics of *jus cogens* under the Vienna Treaty Convention. But it was not necessary for it to do so. As a number of commentators have pointed out, the Court only had to answer the question of whether or not the United Kingdom would be violating the Convention when extraditing Jens Soering.[24]

*2.2.2.* Jus cogen*s:* Al-Adsani

In only one case has the Court hitherto accepted *expressis verbis* the existence of *jus cogens*: in the case of *Al-Adsani*. Al-Adsani had launched civil proceedings in the United Kingdom against the state of Kuwait in order to obtain redress for ill-treatment suffered in Kuwait from agents of that state. This was denied under a domestic act that granted immunity in civil proceedings to states. Limitations to the right of access to a court under Article 6(1) ECHR are allowed for, as we saw above, if (*inter alia*) they pursue a legitimate aim, and are proportionate to it.[25] The assessment of proportionality must take due account of 'relevant rules of international law applicable in the relation between the parties' (see Article 31(3)(c) VTC). The domestic Act was in accordance with the 1972 Basle Convention on state immunity; therefore the denial of the tort claim was 'in principle' not disproportionate and hence in accordance with Article 6, so the Court reasons.[26] But Al-Adsani submitted that as his tort claim concerned redress for torture, the peremptory norm should take precedence over any grant of immunity. Hence in this case the Court had to address whether or not the prohibition of torture has precedence over a competing treaty norm. Accepting that the ill-treatment to which Al-Adsani had been subjected 'can properly be categorized as torture within the meaning of Article 3 of the Convention',[27] the Court ventures to assess the peremptory status of the prohibition of torture:

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23 *Soering*, *supra* note 16, at 88 (emphasis added).
24 R. A. Lawson, *Het EVRM en de Europese Gemeenschappen* (1999), at 176.
25 *Al-Adsani*, *supra* note 14, at 53.
26 Ibid., at 55–7.
27 Ibid., at 58.

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> Within the Convention system it has long been recognized that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances . . . Of all the categories of ill-treatment prohibited by Article 3, 'torture' has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering.[28]

It then observes that '[o]ther areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture', mentioning *inter alia* Articles 5 of the Universal Declaration of Human Rights (UDHR) and 7 ICCPR. The Court further remarks that '[i]n addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*'.[29] It is 'on the basis of these authorities' that the Court 'accepts' the peremptory status of the prohibition of torture.[30]

What can we deduce from this assessment? The Court accepts that the prohibition of torture as laid down in Articles 5 UDHR and 7 ICCPR is peremptory. The wording of these provisions is almost[31] identical to Article 3 ECHR. It further classifies the treatment of Al-Adsani as torture in the sense of Article 3 ECHR. When assessing the prohibition under international law, the Court silently assumes that Article 3 ECHR codifies the same norm. Besides, Article 3 ECHR should, like any other Convention provision, be interpreted and applied 'in accordance with relevant rules of international law'[32] – here, the peremptory prohibition of torture. Hence the prohibition of torture laid down in Article 3 ECHR is a peremptory norm.

In *Al-Adsani* the Court stated explicitly what it implied in *Soering* – that the prohibition of torture is a peremptory norm. In the latter context it referred to the 'absolute character' of Article 3 ECHR, which implies that the whole of this provision is peremptory, the prohibitions of inhuman and degrading treatment and punishment included. This does not surprise. The absolute character of Article 3 ECHR is based on its fundamental character, and a similar criterion appears to be relevant for accepting the peremptory status of norms of international law.[33] But the judgments on whose authority the Court concluded that the prohibition of torture is an international *jus cogens* norm do not refer to inhuman or degrading treatment. Lawson suggests as an alternative solution the notion of regional *jus cogens*: if all states of a certain region (here, the members of the Council of Europe) accept a certain norm and accept its non-derogability, that norm would have peremptory effects for those states.[34] For present purposes, however, it is sufficient that the absolute character of

28 Ibid., at 59.
29 Ibid., at 60.
30 Ibid., at 61.
31 Arts. 7 ICCPR and 5 UDHR speak of 'to torture or to cruel, inhuman or degrading treatment or punishment', Art. 3 of 'torture or inhuman or degrading treatment or punishment'. As these are understood to list forms of ill-treatment in descending order of severity (see section 6 below), 'cruel' treatment is covered by Art. 3 ECHR as well.
32 Art. 31(1)(c) VTC; cf. *Al-Adsani*, *supra* note 14, at 55, and *Loizidou*, Judgment of 18 December 1996 (Merits), [1996] ECHR Rep. 1996-VI, at 43 (cf. R. Lawson and H. G. Schermers, *Leading Cases of the European Court of Human Rights* (1999), at 544–5).
33 Seidermann, *supra* note 18, at 77–8.
34 Lawson, *supra* note 24, at 168–74.

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Article 3 ECHR is confirmed by the absolute and presumably peremptory status of the prohibition on torture and inhuman and degrading treatment or punishment in international law.

### 2.3. The absolute nature of the prohibition of *refoulement*

Is the prohibition of *refoulement* under Article 3 ECHR also absolute, and what does absoluteness mean in this context? In *Soering*, the Court's reasoning on the matter is somewhat complicated as the determination of whether or not Article 3 ECHR applies to expulsion is partially mixed with the determination of the content of that prohibition (is balancing with general interests allowed for, if it has been established that a person will be ill-treated after expulsion?). And as to both contexts, the absolute character of the provision appears to be relevant. I will first address the reasoning why Article 3 prohibits *refoulement*, and then the issue of whether Article 3 ECHR allows for balancing in that context.

#### *2.3.1. The prohibition on expulsion inherent in Article 3 ECHR*

Immediately after its reference to the international (and alleged peremptory) absolute prohibition of ill-treatment, the Court addressed the existence of the prohibition of *refoulement* as follows:

> (1) This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. (2) It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognized as an internationally accepted standard. The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. (3) That the abhorrence of torture has such implications is recognized in Article 3 [. . . CAT]. (4) It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State *where there were substantial grounds for believing that he would be in danger of being subjected to torture*, however heinous the crime allegedly committed. (5) Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view (6) this inherent obligation not to extradite (7) also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.[35]

The Court proceeds in seven steps. (1) Article 3 ECHR enshrines one of the fundamental values of Europe. (2) The same prohibition is recognized by the international community as an international standard in the ICCPR. (3) The international community recognizes in Article 3 CAT that the prohibition of torture (Article 7 ICCPR) implies a prohibition of *refoulement*. (4) Expulsion contrary to Article 3 CAT would

35 *Soering*, *supra* note 16, at 88 (numbering and emphasis added).

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be incompatible with the underlying values of the Convention (the phrase in italics is the literal text of Article 3 CAT). (5) Therefore it would be contrary to the object and purpose of Article 3 ECHR. (6) Therefore it is contrary to Article 3 ECHR. (7) Expulsion resulting in inhuman or degrading treatment would also be contrary to the spirit of Article 3. In terms of the means of interpretation, the Court here states that Article 3 ECHR, read as to object and purpose (cf. Article 31(1) VTC; 'contrary to the spirit and intendment of the Article') prohibits expulsion of a person who runs a real risk of exposure to ill-treatment. That a prohibition of *refoulement* is 'inherent' to the prohibition of ill-treatment is corroborated by Article 3 of the CAT, but only as far as torture is concerned.

We may note that the reasoning hinges on the 'underlying values of the Convention' (step 4). It is this step that connects the explicit prohibition of *refoulement* in Article 3 CAT with Article 3 ECHR: the underlying value informs the object and purpose of Article 3 ECHR. The reasoning could also be rendered as follows: the prohibition of torture is a fundamental value, expressed both in an international instrument (ICCPR) and in the 'absolute' (see step 1) Article 3 ECHR. One aspect of this value is prohibition of expulsion resulting in torture. This is deduced from that value explicitly on the international level in Article 3 CAT, which hence spells out one of the aspects of Article 7 ICCPR, and hence of Article 3 ECHR – for these provisions codify the same value. The 'absolute' nature of Article 3 serves to express the fundamentality of its 'underlying value', and informs us about the scope of the provision: it covers expulsion cases.

The absolute character serves the same purpose in *D* v. *UK*.[36] This case concerned a man in the terminal phase of AIDS who argued that his expulsion to St Kitts would expose him to inhuman and degrading treatment: in the absence of decent medical or social care, he would suffer severely and die a painful death. If he were not expelled, he could continue to benefit from the good medical and social care in the United Kingdom.

According to the Court, D's case differs from Soering's in the following respect. In the latter case, the act of ill-treatment feared will occur after expulsion, in the receiving country, intentionally inflicted by some actor there (in Soering's case, the Virginia authorities). In D's case, 'the source of risk stems from factors which . . . , taken alone, do not in themselves infringe the standards of that Article'.[37] D feared suffering due to socioeconomic factors (absence of health care and so on), and this situation in itself does not amount to inhuman or degrading treatment. So D could not successfully invoke the prohibition on expulsion as worded in *Soering* – there is no real risk of ill-treatment *after* expulsion. However, 'given the *fundamental importance* of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise',[38] such as D's situation, for

36 *D v. UK*, Judgment of 2 May 1997, [1997] ECHR (Rep. 1997-III).
37 Ibid., at 49.
38 Ibid. (emphasis added).

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> To limit the application of Article 3 in this manner would be to undermine the *absolute character* of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.
>
> . . . Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 (art. 3) in view of his present medical condition.[39]

This prohibition differs from the one in *Soering*, as the situation feared after expulsion, combined with the ending of treatment in the United Kingdom by removing him, would constitute ill-treatment. This expansion of the scope of Article 3 ECHR is prompted by 'the fundamental nature of the provision' and its 'absolute character'. So just as in *Soering*, the absolute character is an expression of the fundamentality of the value underlying, or expressed by, Article 3 ECHR, and this absolute and fundamental nature is the decisive argument for defining a scope including the case at hand.

*2.3.2. The absolute character of the prohibition of* refoulement: Chahal *and* Saadi

We saw that expulsion resulting in exposing the expellee to torture would be contrary to the 'underlying values of the Convention', 'however heinous the crime committed'. It seems that the prohibition on expulsion resulting in torture shares the absolute character of the prohibition on torture (put otherwise, is part of the *jus cogens* norm). But this does not hold true for expulsion resulting in inhuman or degrading treatment: the Court stated in *Soering* that for these forms of ill-treatment, balancing is allowed. We will discuss that matter in section 3.3, on the arguments in favour of balancing.

The question whether Article 3 ECHR allows member states to take into account a threat to public order or national security in expulsion cases was brought before the Court again in *Chahal*. This case concerned a Sikh leader who was sought by the Indian authorities for 'terrorist' activities. The Court found it to be established that there was a real risk that Chahal would be subjected to ill-treatment if returned to India. The United Kingdom argued that it should nevertheless be allowed to expel the man as 'the guarantees offered by Article 3 ECHR were not absolute' in expulsion cases (referring in this context to the Court's observations on the search for a fair balance in *Soering* discussed below).[40] The Court, however, stated that '[t]he prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases'.[41] No caveat was made for inhuman or degrading treatment. This absolute character follows from the features discussed above: the text of the provision, the context of the other substantive provisions that do explicitly allow for limitations, and Article 15(2) and the fundamental value that the provision enshrines.[42] The Court did not, in *Chahal* or any other case, allude to the prohibition of ill-treatment in the ICCPR or the (alleged) *jus cogens* norm it has expressed since *Soering*, or to Article 3 CAT.

39 Ibid., at 49–50 (emphasis added).
40 *Chahal*, *supra* note 6, at 76.
41 Ibid., at 80.
42 Ibid., at. 79; *Saadi*, *supra* note 1, at 127.

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The absolute character of the prohibition of *refoulement* as regards all forms of treatment was reaffirmed in *Saadi* on the same grounds, and on one additional ground: the conclusion '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 . . . 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'.[43] The relevant guidelines read as follows:

> The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

and

> It is the duty of a State that has received a request for asylum to ensure that the possible return ('*refoulement*') of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.[44]

The reference to these guidelines may be taken as a reference to 'subsequent agreement between the parties regarding the interpretation'.[45] If so, it may be observed that these guidelines hardly sustain the point the Court aims to make. Point IV, which addresses ill-treatment at large, refers to the 'absolute' prohibition of ill-treatment. Point XII addresses *refoulement* in particular, but does not state that the prohibition is absolute.

So, in *Soering* the Court states that the prohibition on expulsion resulting in torture is absolute – limitation on public order grounds is not allowed. All arguments deriving from the Convention discussed in paragraph 2(1) – text and context of the provision and the underlying values of the Convention – apply. The Court finds further confirmation for its absolute character in statements by the Council of Europe's Council of Ministers, although these guidelines hardly allow for that.

## 3. Balancing in expulsion cases and balancing absolute rights

### 3.1. Balancing in expulsion cases: *Soering* and the search for a fair balance

We saw above that in *Soering* the Court reasoned that the prohibition of expulsion resulting in torture is absolute ('however heinous the crime allegedly committed'). Thus no balancing of the risk of exposure to torture against the general interest of bringing Soering to justice is allowed. But the same does not hold true for expulsion leading to inhuman or degrading treatment or punishment, for the Court continues as follows:

43 Ibid., at 138.
44 Ibid., at 64.
45 Art. 31(3)(a) VTC.

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> What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case . . . Furthermore, *inherent in the whole of the Convention is a search for a fair balance* between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.[46]

So, next to the 'absolute character' of Article 3 ECHR, there is a competing principle that affects the application of the prohibition of *refoulement*: the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It would seem that, after all, balancing of interests is allowed. What this balancing amounted to for the particular case of *Soering* will be discussed below, in section 6.

In *Soering* the Court reserved the working of this principle to inhuman and degrading treatment or punishment. Why it did not apply to expulsion resulting in exposure to torture it did not explain. Maybe this distinction could be explained as the outcome of the 'fair balancing' act: torture is never allowed, but the interests of the community may require limitations to the right not to be inhumanly or degradingly treated. If so, by which means of interpretation referred to in *Soering* could the distinction be justified? Neither text nor context of Article 3 distinguishes between the several forms of ill-treatment. Nor does a reading in accordance with Article 3 CAT explain the difference. For this provision was referred to as testimony that the prohibition of expulsion is inherent to the prohibition on ill-treatment of Article 7 ICCPR, which also does not explain this distinction. The only element of interpretation that could possibly explain this distinction is the 'underlying values of the Convention', but why and on what grounds those values could be understood as making this distinction are not elaborated.

After *Soering*, it seemed for a time that the balance test had been abandoned in expulsion cases. We saw above that in *Chahal* (1996) the Court flatly denied the possibility of balancing ill-treatment against public order:

> It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of [. . . *Soering*, stating that the search for a fair balance underlies the whole of the Convention], that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.[47]

However, it confirmed the relevance of the balancing test in *N* v. *UK*, the Ugandan medical case:

46 *Soering*, *supra* note 16, at 89 (emphasis added).
47 *Chahal*, *supra* note 6, at 81.

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> [I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Soering* v. *the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §89).[48]

So the principle stated in *Soering*, it appears, still applies, and it still applies to the 'whole of the Convention'.

How could this approach be reconciled with the stated absoluteness of the prohibition of *refoulement*? Other case law on this search for a fair balance throws some light on the issue. It appears that 'this constant search for a balance between the fundamental rights of each individual . . . constitutes the foundation of a "democratic society"'.[49] In *Klass*, the Court identified the basis for this search for a fair balance:

> [S]ome compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention . . . As the Preamble to the Convention states, 'Fundamental Freedoms . . . are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend'.[50]

Hence the very notion of 'fundamental freedom' is subject to this tension between general and individual interests.

Which requirements for defending democratic society could inform interpretation of ECHR provisions when no explicit reference is made to them in the provision concerned (as Article 3 ECHR)? The Court offered a general criterion in *Chassagnou*. The case concerned a French law stating that owners of land in certain areas automatically became members of a hunting association (in order to enable its members to make use of their plots during hunts). Chassagnou appealed to the right not to be forced to join an association under Article 11, a right that allows for interferences serving legitimate aims. France invoked the aim of 'protecting the rights and freedoms of others', in particular their 'right to hunt'. The Court stated,

> In the present case the only aim invoked by the Government to justify the interference complained of was 'protection of the rights and freedoms of others'. Where these 'rights and freedoms' are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society' . . . It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.[51]

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48 *N v. UK*, *supra* note 2, at 44.

49 E.g. *Chassagnou and others v. France*, Judgment of 29 April 1999, [1999] ECHR (Rep. 1999-III), at 113. In *Öcalan v. Turkey*, Judgment of 12 May 2005, [2005] ECHR (Rep. 2005-IV), at 88, the Grand Chamber explicitly referred to the consideration in *Soering* quoted above when addressing the question of whether Öcalan's arrest outside the territorial jurisdiction of Turkey was 'lawful' for the purposes of Art. 5.

50 *Klass v. Germany*, Judgment of 6 September 1978, [1978] ECHR (Ser. A 28), at 59.

51 *Chassagnou*, *supra* note 49, at 113.

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Hence the second paragraph of Article 11 allows for limitation with the aim of protecting the Convention rights of others. Besides, the right of Article 11 is subject to interferences justified by 'indisputable imperatives'. So the search for a fair balance is primarily expressed in the limitation clause, but may also justify interferences *not* laid down in the Convention text.

### 3.2. Balancing absolute rights

In sum, 'absoluteness' has two meanings or effects in the case law in expulsion cases. First, as an expression of a fundamental value it serves to inform the delimitation of scope: reference to this absoluteness was relevant for deciding that *refoulement* cases are covered by Article 3 (*Soering*), and the same holds true for medical cases (*D* v. *UK*). Second, it means that no balancing of interests, hence no limitations or interferences, are allowed for in *refoulement* cases (*Saadi* and *Chahal*). But in medical cases, the absoluteness of the provision does not have this consequence (*N* v. *UK*). Remarkably, in this last case the Court referred to *Soering* as the authority as regards the search for a fair balance in the context of Article 3 ECHR.

It follows that the formal feature of Article 3 ECHR, the absence of a limitation clause, does not exclude balancing of the right it protects against 'indisputable imperatives'. Whether this balancing is allowed for or not depends on the relative weight of the 'fundamentality' of the provision and the search for a fair balance, both of which derive from the object and purpose of the provision. This leaves us with two possibilities. First, the prohibition of *refoulement* is absolute in each and every respect: no interest or imperative, however indisputable, could ever justify an interference. Second, the absolute character prohibits balancing against some interests, but not against 'indisputable imperatives'. The choice between both possibilities entails a change in meaning of the term 'absolute'. In the first case, 'absolute' means that no balancing whatsoever can take place if the prohibition of *refoulement* is involved. In the second case, 'absolute' means that risk assessment and/or qualification as ill-treatment may suffer inherent limitations, but otherwise no limitation may be applied to the prohibition of *refoulement*.

Arguably, the notions of fundamentality and the search for a fair balance are of such a nature that they do not allow for a definite choice between these two possibilities – the Court's case law offers insufficient clues on the concepts of absoluteness or fair balance to conclude that, for example, the absolute prohibition should be considered the outcome of the fair balance test. Rather, we should address the case law of the Court on the prohibition of *refoulement* and see whether or not the application denies or confirms that balancing takes place, in some form or other, openly or covertly. That the prohibition of *refoulement* does or, applied properly, should allow for balancing is exactly the point the United Kingdom tries to make in *Chahal* and *Saadi*.

The UK government suggested three possibilities for accommodating the fair balance test in the prohibition of *refoulement*. (i) The most radical possibility denies that the prohibition of *refoulement* of Article 3 ECHR (or, slightly less radical, only the prohibition of expulsion resulting in degrading treatment) is absolute. In *Chahal* the United Kingdom stated that 'there was an implied limitation to Article 3 entitling a

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Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds'.[52] This possibility will be discussed in section 4. (ii) In *Saadi*, the UK government also stated that

> national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country.[53]

Thus risk assessment could be subject to a balance test. This point will be discussed in section 5. (iii) The third possibility would be the one actually indicated by the Court in *Soering*: the qualification of the feared act as inhuman or degrading treatment. In *Soering* the Court deemed the interest of putting criminals on trial relevant for the qualification of the risked treatment as inhuman or degrading treatment or punishment. In section 6 below we shall discuss the '*Soering* approach' in some detail as to whether qualification involves balancing or not.

## 4. Implied limitations

Why would the prohibition of *refoulement* allow for 'implied limitations'? In *Saadi*, the UK government proposed two grounds for holding so. First,

> in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then 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.[54]

This argument proceeds in three steps. First, the prohibition of expulsion is of its nature a positive obligation. Second, positive obligations allow member states to balance the applicant's rights against general interests. Third, one of the relevant interests that may be taken into account is national security. This is basically a consistency argument: the Court should not deem the prohibition of *refoulement* absolute as similar positive obligations are not absolute either.

The second argument dwells on Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention, RC), which do allow for expulsion of refugees if they pose a threat to public order or national security. Thus a reading of Article 3 ECHR in the light of relevant international law shows that the prohibition of *refoulement* should be construed as allowing for balancing the risk of ill-treatment against order and security concerns. I shall discuss both arguments below.

52 *Chahal*, *supra* note 6, at 76.
53 *Saadi*, *supra* note 1, at 122.
54 Ibid., at 120.

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## 4.1. Positive obligations

### *4.1.1. The concept*

The European Court of Human Rights does distinguish between positive and negative obligations, but has never stated a definition.[55] Judge Martens defined positive obligations in his Dissenting Opinion to *Gül* as the obligation 'requiring member states to take action'.[56] Thus positive obligations are obligations requiring the states to take measures to safeguard Convention rights. They stand in opposition to 'negative obligations', that is the obligation requiring states to refrain from taking action.

It has often been observed that the distinction between negative and positive obligations is far from clear, including by the Court itself.[57] According to some authors, the distinction is merely semantic;[58] others believe that meaningful definitions can be coined.[59] Here, I shall not address those various definitions. Rather, I shall first discuss how the Court defined the prohibition of *refoulement*, and then compare the prohibition with positive and negative obligations under Articles 2 and 3 ECHR identified by the Court, in order to see whether consistency requires or allows for defining the prohibition as a positive obligation.

### *4.1.2. The Court's phrasing*

Is the prohibition of expulsion a positive obligation? As regards medical cases, the Court's reasoning in *N* v. *UK* strongly suggest that these concern a positive obligation. Appeal to Article 3 ECHR against expulsion in medical cases comes down to claiming 'medical, social or other forms of assistance and services provided by the expelling state'.[60] And in *D* v. *UK*, it suggested that the duty to 'secure' laid down in Article 1 ECHR was at stake.[61]

For *refoulement* cases the case law is more ambiguous. The definition of the prohibition most commonly applied by the Court runs as follows:

> [E]xpulsion by a Contracting State 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, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country.[62]

This definition employs 'negative' wording – the obligation to refrain from the action of expelling. The assessment of the risk, on the other hand, would require action, and hence constitute a positive element. But it seems that the Court itself conceives

55 Or rather, refused to do so; cf. *Ärzte für das Leben v. Austria*, Judgment of 21 June 1988, [1988] ECHR (Ser. A no. 139), at 31: 'The Court does not have to develop a general theory of the positive obligations which may flow from the Convention'.

56 A. R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), 2.

57 *Gül v. Switzerland*, Judgment of 19 February 1996, [1996] ECtHR (Rep. 1996-I), at 38; cf. R. A. Lawson, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de fair balance-test', (1995) 20 *NJCM-Bulletin* 538.

58 C. Forder, 'Positieve verplichtingen in het kader van het EVRM', (1992) 17 *NJCM-Bulletin* 611.

59 C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischer Menschenrechtskonvention* (2003).

60 *N v. UK*, *supra* note 2, at 42.

61 *D v. UK*, *supra* note 36, at 48.

62 *Saadi*, *supra* note 1, at 125, with references to numerous previous judgments.

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of the prohibition of *refoulement* as a negative obligation, as it stressed the negative element as its core:

> In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State *by reason of its having taken action* which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[63]

Liability for taking action is liability for a negative obligation. Further, the Court based this obligation in *Soering*[64] and later judgments[65] on Article 3 itself, not on Article 1 ECHR which is usual when positive obligations as regards the right not to be subjected to ill-treatment are concerned.[66]

*4.1.3. The prohibition of refoulement as a duty to prevent*

In an alternative reading, proposed by Lawson and Noll, in expulsion cases state responsibility is based on the obligation to secure (in Article 1), because the responsibility of the state rests only on the act of exposure to ill-treatment.[67] As the expelling state is only indirectly implicated in the actual infliction of the ill-treatment, its responsibility is necessarily limited to prevention of inflictions on that right, just as state responsibility under Article 2 in case of murder by an individual (not being a state organ) can rest only on omission of sufficient protection measures,[68] or in domestic cases under Article 3 ECHR concerning prevention of ill-treatment of children by their parents or guardians.[69]

Which action is required by the obligation to prevent ill-treatment in expulsion cases? Noll suggests that it is the assessment of risk.[70] Arguably, it would be an overstatement to equate the prohibition of *refoulement* with the obligation to assess

63 *Soering, supra* note 16, at 91 (emphasis added); repeated in, *inter alia, Askarov and Mamatkulov v. Turkey*, Judgment (GC) of 4 February 2005, [2005] ECHR (Rep. 2005-I), at 67; *Saadi, supra* note 1, at 126.

64 Noll has stated that it follows from para. 86 in *Soering* that the Court based the prohibition of *refoulement* on the obligation 'to secure' in Art. 1 (Noll, *supra* note 17, at 396–7). Arguably, there is no need for assuming so: in the paragraph mentioned, the Court rather addressed the other element of Art. 1, the scope of the states' 'jurisdiction': 'Article 1 of the Convention . . . sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ['reconnaître' in the French text] the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.'

65 There is one exception: the Court based the obligation not to expel on the obligation 'to secure' in Art. 1 in its decision *TI v. UK*, Decision of 7 March 2000, [2000] ECHR (Rep. 2000-III). That case concerned the expulsion of a Tamil to Germany. The applicant feared that Germany would subsequently expel him to Sri Lanka, where he feared ill-treatment. The issue at stake therefore was not the expulsion to Germany as such (the normal prohibition of *refoulement*), but rather whether the United Kingdom had duly established that Germany afforded sufficient safeguards against chain *refoulement* to Sri Lanka.

66 It may further be noted that before *Soering*, in *Abdulaziz* (referred to in *Soering, supra* note 16, at 85, see above), the Court had already accepted positive obligations as regards migration issues. Furthermore, the European Commission on Human Rights based the prohibition of expulsion in *Soering* on Art. 1 (ECmHR 19 January 1989, at 94–9).

67 Lawson, *supra* note 24, at 242–3; Noll, *supra* note 17, at 470.

68 Cf. Lawson, *supra* note 24, at 213–14, 231–3, 243. Lawson's analysis is strongly concerned with a model for state responsibility for acts by international organizations; his argument builds on analogous application of Art. 11 of the ILC 1996 Draft Articles on State Responsibility, concerning state responsibility for conduct by individuals. That article has not been adopted in the final version of those Articles. This, however, does in itself not affect the validity of his interpretation of the principles for attribution of state responsibility in the case law of the Court.

69 Cf. *A v. UK*, Judgment of 23 September 1998, [1998] ECHR (Rep. 1998-VI).

70 Noll, *supra* note 17, at 467–73.

the risk because mere omission of risk assessment does not bring state obligations under Article 3 ECHR into play. If, upon an application for asylum, the risk of ill-treatment is not assessed, states cannot incur liability as long as they do not expel the asylum seeker.[71] Therefore, the analogy to domestic child care cases is imperfect. Child care cases concern the situation where children are being mistreated, or are in danger of being ill-treated, unless the state intervenes. In expulsion cases the person concerned is free from danger of ill-treatment as long as the state does not take action and expel him; therefore the state is more directly implicated in the actual occurrence of the ill-treatment. A closer analogy to expulsion cases would be the case where state agents hand over the person concerned to a third party, although they foresee (or ought to foresee) that this third party will ill-treat him. This close analogy was considered by the Court in the case of *Paul and Audrey Edwards* v. *UK*. Christopher Edwards, the son of Paul and Audrey Edwards, was in a prison cell when he received company in the form of another prison inmate, Richard Linford, who, soon after his arrival, killed him. Family members complained that the UK authorities were responsible for his death and hence liable under Article 2 ECHR. The Court examined

> firstly, whether the authorities knew or ought to have known of the existence of a real and immediate risk to the life of Christopher Edwards from the acts of Richard Linford and, secondly, whether they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[72]

It turned out that the murder had indeed been foreseeable: from, *inter alia*, medical records it should have been clear to the state authorities that Linford was mentally ill and extremely dangerous. Hence, after an assessment of 'real and immediate risk' to Edwards's life, the Court examined the United Kingdom's obligation 'to take measures' to avoid this risk. Taking measures take the form of refraining from action (for example, not transferring Linford but leaving him where he was). The Court qualifies this obligation as a positive one.[73] Translated to expulsion cases, the Court identifies two questions: first, is there a real risk that the applicant will be subjected to ill-treatment by the acts of the receiving state (or some third party there)? Second, did the expelling state fail to take measure which, judged reasonably, might have been expected to avoid this risk? Such measures could include proper assessment of the risk and, if it turns out that the risk is real, obtaining diplomatic guarantees in order to reduce the risk to below the level of 'real'. Alternatively, the state could, if a decision to expel the applicant invoked Article 3 ECHR, simply stop removal proceedings, which would also avoid the risk from materializing. Obviously it may do the same when it turns out, after assessment, that the risk is real.

So the duty to prevent in a domestic case like *Edwards* v. *UK* is structured in a way similar to *refoulement* cases. And it appears that in domestic cases the Court conceives of the obligation concerned as a positive one. Consistency requires that

71 Cf. *Bonger v. The Netherlands*, Decision of 15 September 2005, [2005] ECHR (appl. no. 10154/04).
72 *Paul and Audrey Edwards v. UK*, Judgment of 14 March 2002, [2002] ECHR (Rep. 2002-II), at 55.
73 Ibid.

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the prohibition of *refoulement* can likewise be understood as a positive obligation – the obligation to perform risk assessment. True, the Court never stated that states can violate the prohibition of *refoulement* by not performing this assessment (i.e. in the absence of expulsion), but it came very close to it in *Jabari* v. *Turkey*.[74] In that case, neither the first decision maker nor the appeal bodies had, upon Jabari's request for asylum, performed a meaningful assessment of the merits of the claim. The Court concluded that therefore they had acted 'at variance with' Article 3 ECHR. In doing so, the Court came very close to stating that not conducting a meaningful assessment of asylum applications violates Article 3 ECHR. But it did not go that far. It established that Jabari ran a real risk of being subjected to ill-treatment upon expulsion, and concluded that expulsion would violate the provision. It could do so because the Office of the UN High Commissioner for Refugees (UNHCR) had performed an assessment of the merits of the case on which the Court could rely.

#### *4.1.4. The obligation to assess risk and balancing*

Hence we can accept the first step in the argument of the UK government: the prohibition of *refoulement* is or can be understood as a positive obligation, in so far as it requires that states perform assessment of the risk of ill-treatment if they want to remove a person who stated that upon this removal he would run a real risk of being subjected to ill-treatment. The second step in the argument runs that states are therefore allowed to balance the real risk of ill-treatment against the interests of the community as a whole: another outcome would be inconsistent with the case law on positive obligations.

Is that reasoning correct? Undoubtedly, there are positive obligations that allow for balancing against certain interests. The Court's reasoning in *N* v. *UK* may serve as an example – as we saw above, the obligation to continue 'provision of free and unlimited health care' cannot extend to 'all aliens without a right to stay' as that 'would place too great a burden on the Contracting States'.[75] However, the positive obligation involved in *refoulement* cases does not concern provision of some good, but risk assessment. Therefore we should address the question of whether the obligation to perform risk assessment implicitly or explicitly allows for balancing the interests of the individual against general interests.

#### *4.1.5. Delimiting the scope of the obligation to assess*

The obligation to perform an assessment of whether the risk is real follows from the definition of the prohibition of *refoulement*, in case it is 'foreseeable' that the expellee will be subjected to ill-treatment. In *Soering*, the Court observed that

> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged

74 *Jabari v. Turkey*, Judgment of 11 July 2000, [2000] ECHR (Rep. 2000-VIII), at 37.
75 *N v. UK*, *supra* note 2, at 44.

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> suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.[76]

The requirement to render the protection 'practical and effective' in turn rests on, once again, 'the object and purpose of the Convention as an instrument for the protection of individual human beings'.[77] This requirement also applies to the states' obligations under Article 3 ECHR and hence may explain the requirement of risk assessment. This widens Convention protection as compared with a (hypothetical) prohibition of each expulsion that has taken place and resulted in ill-treatment: people whose ill-treatment is foreseeable are now protected from being expelled (and hence from being ill-treated).

The duty to foresee – that is, to perform risk assessment – is, however, limited. The Court never addressed the limits to this duty in its case law on *refoulement*, but it did so in cases on the obligation to prevent ill-treatment within the jurisdiction. Responsibility under Article 2 ECHR is limited to cases where

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk . . . Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[78]

The 'choices which must be made in terms of priorities and resources' (in the quote above) make it clear that general interests are balanced against the interest of being protected against assaults on life. The same certainly applies in expulsion cases. The more time and personnel that are invested in sorting out the situation in the country of origin and the background of the applicant, the better the prediction of future events will be (i.e. the assessment of risk of ill-treatment will be). Hence domestic authorities (both the executive that takes the decision to expel and the judiciary) are, for example, required to perform a 'rigorous scrutiny' of the merits of the claim.[79] This requirement applies 'in view of the absoluter character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[80] But there is a limit to the means states must invest in this risk assessment, if only because of competing priorities as regards the states' limited resources. For example, it falls upon the applicant to substantiate the grounds for believing that the risk of ill-treatment is real. If domestic authorities were required to perform such risk assessment *ex officio*, the protection would doubtlessly be improved. Why the 'absolute character' does not demand *ex officio* scrutiny of risk of ill-treatment upon expulsion the Court has never explained.

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76 *Soering*, *supra* note 16, at 90.
77 Ibid., at 87.
78 *Paul and Audrey Edwards v. UK*, *supra* note 72, at 55.
79 *Jabari*, *supra* note 74, at 39.
80 *Vilvarajah and others v. UK*, Judgment of 30 October 1991, [1991] ECHR (Ser. A215), at 108.

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There is very little case law addressing first decision-making in expulsion cases. Appeal procedures as regards expulsion cases are required by Article 13 of the European Convention, which requires an 'effective remedy' in case of an arguable claim that Convention rights are or will be violated (which implies without doubt a positive obligation). Application of the provision yields the same picture as sketched above. As regards arguable claims that upon expulsion the applicant runs a real risk of being subjected to ill-treatment, Article 13 requires that the appeal body be 'independent' from the first decision-maker, subject the decision to expel to a 'rigorous scrutiny', and be competent to address the 'substance' of the claim and to quash the decision. But this does not preclude domestic authorities from stating 'reasonable time limits'; exercise of the right to appeal 'must not be unjustifiably hindered by the acts or omissions of the authorities'.[81] Certain limitations are hence allowed for ('reasonable' or 'justifiable'). Again, the Court states that the minimum level required is informed by 'the fundamental importance' of Article 3,[82] but it does not state which factors limit the scope of obligation.

We can conclude that the same interpretation elements that serve as the foundation for the prohibition's absolute character define a certain minimum level for means to be invested in the assessment. This duty is limited, but criteria or factors for this limitation are not given. Arguably, this limitation can only be explained by a balancing test – on the one hand, the interest that no expulsion will take place in the case of real risk of ill-treatment, and the general interest to keep invested resources within 'reasonable' limits – that is, financial interest.

*4.1.6. Balancing against public order concerns?*

Hence we can follow the UK government's second step: the positive obligation to perform risk assessment does allow for balancing, at least as regards one general interest – finance. Should we follow the third step in the United Kingdom's reasoning, and accept that other general interests, such as public order and national security concerns, may be also taken into account?

Analogy with medical cases suggests otherwise. In *D* v. *UK*, the applicant had been convicted in the United Kingdom of possession of cocaine.[83] But the Court deemed this circumstance irrelevant for the conformity of expulsion with Article 3 ECHR, referring in this context to the fundamentality of Article 3 ECHR, and its absolute character.[84] Nor do domestic cases on preventive measures imply that public order concerns are relevant. The crime for which Edwards was sentenced was not taken into account when appraising the UK authorities' efforts to prevent Linford from killing him. In prevention cases, the previous conduct of the person concerned appears not to be relevant for delimiting the scope of state obligations. In terms of consistency, then, there is no ground to state that this circumstance should be taken into account. But in terms of reasons, we can only guess why the scarcity

81 *Hilal v. UK*, Judgment of 6 March 2001, [2001] ECHR (Rep. 2001-II), at 75.
82 *Aksoy v. Turkey*, Judgment of 18 December 1996, [1996] ECHR (Rep. 1996-VI), at 98; *Hilal*, *supra* note 81 at. 75.
83 *D v. UK*, *supra* note 36, at 6.
84 Ibid., at 46–7.

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of the states' resources are a relevant factor for the balancing act, and public order or security issues not.

*4.1.7. Conclusion*

In sum, the prohibition of *refoulement* can be understood as a positive obligation, an obligation to prevent ill-treatment, in cases where the state is willing to expel the alien. The act required would be assessment of the risk of ill-treatment. This assessment must be in conformity with certain minimum requirements, defined with reference to the absolute nature of Article 3 ECHR, but limited to what may be reasonably expected. This can only be explained as the outcome of balancing the right protected by Article 3 against general, in particular economic, interests – as suggested in *N* v. *UK*. But the Court's case law offers no clue that positive obligations imply balancing against other interests, in particular public order, as well. It appears that the 'absolute' character of Article 3 hence does not preclude all balancing, only balancing as regards certain interests. We may further note that it serves as an argument to identify certain obligations as regards assessment.

One final remark on the labelling of the prohibition as a positive or negative obligation. The definition of the prohibition of *refoulement* emphasizes the involved negative obligation – the duty not to commit the act of expulsion. In the similarly structured domestic prevention cases, the Court puts emphasis on the involved duty to act (i.e. to assess the risk). Materially, it makes no difference which element is highlighted, as we saw above. But we may observe that a prohibition on expulsion implies a clear-cut obligation, whereas focus on the obligation to assess the risk does not. And a clear-cut obligation accommodates the label of 'absoluteness' far better than a blurry one.

### 4.2. The Refugee Convention

The United Kingdom referred further to an external argument for assuming that the prohibition of *refoulement* should allow for balancing the interests of the applicant against the interests of the community as a whole: Articles 32 and 33 of the Refugee Convention. According to these provisions, a person who qualifies as a refugee as defined in Article 1 of the Refugee Convention, hence as a person who has well-founded fear of being persecuted in his country of origin, can be expelled to that country if he poses a threat to 'public order or national security'.[85] So under the Refugee Convention a state can return a person who has well-founded fear of being tortured in his country of origin, if he is a threat to public order. In answer to this argument the Court simply observed that as protection against treatment prohibited by Article 3 is absolute, 'the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 [RC]'.[86] This observation is not conclusive. The point of the UK argument is not to deny that the formal features of Article 3 suggest

85 Arts. 32 and 33 RC differ, as the former applies only to refugees who are 'lawfully present', and the latter to all refugees, i.e. to all persons who fulfil the conditions of Art. 1 RC, also if their presence is not yet or no longer lawful.

86 *Saadi*, *supra* note 1, at 138.

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that its protection is absolute, but to state that these properties are not conclusive as another element relevant for interpreting the provision, Articles 32 and 33 RC, points in the opposite direction. Emphasis on the formal features of the provision does not answer this allegation.

But it does not follow that the United Kingdom's argument is conclusive. As the UK government observed, Articles 32 and 33 deal with 'the right to political asylum'.[87] Article 3 ECHR and Article 3 CAT serve to protect people from torture, the Refugee Convention provisions, on the other hand, to delimit the right to asylum. In doing so, the instrument strives for a careful balance between the interests of the receiving state and the individual. The instrument grants refugees residential rights (such as the right to access to education, welfare, the labour market, and so on). As presence in a contracting state is requisite for claiming most of these benefits, the prohibitions on *refoulement* serve not only to protect refugees from persecution, but also to delimit the scope for beneficiaries of those residential rights. Article 3 ECHR serves another purpose – protection from ill-treatment. It does not serve to grant political asylum. As the purposes of the prohibitions of *refoulement* in the Refugee Convention and Article 3 ECHR differ, there is no ground for assuming that the latter is inherently limited in the same way as the former.

## 5. The risk standard and balancing

### 5.1. The UK position

The prohibition of *refoulement* applies if 'substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk' of being subjected to ill-treatment after expulsion. The United Kingdom argued that national security considerations should influence the standard of proof required from the applicant.[88] Whereas (in ordinary cases) the standard is 'real risk', in national security cases it should be raised to 'more likely than not':

> In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of 'degrading treatment'. And the nature of the threat presented by an individual to the signatory State also varied significantly . . . [I]f the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was 'more likely than not' that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture.[89]

87 Ibid., at 120. That the Refugee Convention serves the purpose of defining claims to asylum can indeed be derived from *inter alia* the Preamble of the instrument; see Battjes, *supra* note 5, at 62–3.
88 *Saadi*, *supra* note 1, at 122.
89 Ibid., at 121–2.

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Although this reasoning is somewhat confused, we may understand it as follows. First, 'real risk' is a flexible ('speculative', 'hard to apply consistently') standard – it may vary between, say, a 30 per cent and an 80 per cent chance. Second, it is therefore open to balancing against other interests such as national security concerns: if in an average case 30 per cent would suffice, in extradition cases 'more likely than not' – more than, say, a 50 per cent chance – should be required.

The Court replied that the approach proposed by the United Kingdom 'would not be compatible with the absolute nature of the protection afforded by Article 3'[90] – which, arguably, concerns the first step. Admitting that 'assessment of . . . risk is to some degree speculative',[91] the Court rejects the argument, stating that 'dangerousness' and 'risk' are different concepts, and therefore not suitable for balancing[92] – which concerns the second step. It further confirms earlier case law that, in national security as in other cases, the standard remains 'real risk'.[93] The UK government, however, did not refer to the balancing exercise discussed above, but to the standard of proof – the magnitude of the risk required to trigger the prohibition on expulsion. Therefore, we should address the first issue: how flexible is the risk standard?

### 5.2. Defining real risk

How, or on what grounds, is the risk standard set as it is? In the consideration in *Soering*, where it concluded that a prohibition of *refoulement* is inherent in Article 3, the Court speaks subsequently of extradition to a state where the fugitive 'would be subjected or likely be subjected' to ill-treatment, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture' (the text of Article 3 CAT), and of 'a real risk of exposure to' ill-treatment;[94] finally, it settles the standard at 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected' to ill-treatment.[95] It seems that these terms are interchangeable; we may note that there is no reason to assume that the standard 'substantial grounds for believing that there is a real risk' differs from the 'danger' standard in Article 3 CAT. Which requirements the risk standard entails, however, cannot be deduced from these various phrasings.

By use of which means does the Court define the level of risk required by the 'real risk' standard? The Court never explained this in expulsion cases. In domestic positive obligation cases under Article 2, it applies the similar standard 'real and immediate risk'. In *Osman*, the Court stated that this standard should not be too 'rigid', as Article 1 requires 'practical and effective protection', and because the right protected by Article 2 is 'fundamental in the scheme of the Convention'.[96] Both factors apply to expulsion cases under Article 3 ECHR, which implies that the real risk standard should not be too 'rigid' either.

90 Ibid., at 140.
91 Ibid., at 143.
92 Ibid., at 139.
93 Ibid.
94 *Soering*, *supra* note 16, at 88.
95 Ibid., at 91.
96 *Osman v. UK*, Judgment of 28 October 1998, [1998] ECHR (Rep. 1998-VIII), at 116.

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### 5.3. Paraphrasing real risk

In a number of cases the Court used phrasing that seemed to circumscribe the standard of proof. In *Vilvarajah* the Court stated that 'a mere possibility' of ill-treatment would not do,[97] which can be taken as a negative definition of the standard of proof (in the sense that real risk is more than that). A positive definition is given only in the extradition cases *Shamayev* and *Garabayev*, where the Court stated that the standard of proof for assessing the evidence of ill-treatment having taken place is 'beyond reasonable doubt'.[98] The 'beyond reasonable doubt' test usually applies to (alleged) past breaches of Article 3 ECHR within the states' jurisdiction.[99] In both cases the applicants had already been expelled before the cases came before the Court, and

> the Court is not precluded . . . from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears.[100]

Still, even if extradition or expulsion has already taken place, the standard remains 'real risk', as the Court reaffirmed in both judgements. As Vedsted-Hansen (and Judge Zupančič in his concurring opinion in *Saadi*) point out, assessment of proof of past events differs conceptually from assessment of information concerning future events.[101] Thus the use of the 'beyond reasonable doubt' standard for risk assessment would be conceptually mistaken. Even so, the standard of likelihood required by 'real risk' could be the equivalent of this relatively rigid standard of proof.

It has been observed that this standard seems hard to reconcile with *Soering*.[102] In this case the Court had to address the question whether the guarantees provided by the US authorities that the death penalty would not be imposed (and hence there would be no chance of ill-treatment) were sufficient. The Court ruled that 'objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed'.[103]

In a similar vein, the Court ruled in the recent case of *NA* v. *UK* as regards the 'assessment of the existence of a real risk' that

> It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N* v. *Finland*, no. 38885/02, §167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.[104]

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97 *Vilvarajah*, *supra* note 80, at 111.
98 *Shamayev and others v. Georgia and Russia*, Judgment of 12 April 2005, [2005] ECHR (Rep. 2005-III), at 338; *Grabayev v. Russia*, Judgment of 7 June 2007, [2007] ECHR (appl. no. 38411/02), at 76.
99 P. Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2005), 410 ff.
100 *Cruz Varas v. Sweden*, Judgment of 20 March 2001, [2001] ECHR (Ser. A210), at 76, referred to in *Shamayev*, *supra* note 98, at 337.
101 J. Vedsted-Hansen, 'The Borderline between Questions of Law and Questions of Fact', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (2005), 57f.
102 Ibid., at 438, n.190.
103 *Soering*, *supra* note 16, at 98.
104 *NA v. UK*, Judgment of 17 July 2008, [2008] ECHR (appl. no. 25094/07), at 111.

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So adducing evidence merely 'capable of proving' substantial grounds that the risk is real suffices – it would be for the government to 'dispel any doubts'. Obviously, this threshold is much lower than the one set in medical cases. And as the Court stated itself in *N* v. *UK*, this threshold is the outcome of a balancing act – the interest of N not to be expelled and the financial interests of the state.

### 5.4. Balancing the risk

If anything, the application of the risk standard by the Court is, as the UK government stated, far from consistent. Should we infer that balancing is therefore allowed when assessing the reality of risk? Indeed, one explanation would be that in some cases (*Garabayev*) the Court applies a more demanding standard than in other cases – which could imply that the risk standard is the outcome of a balance against the public order threats set by the extradited person. This has been denied by the Court in *Saadi*: in answer to the UK statement in *Saadi* that a 'more likely than not' standard should apply to suspects of terrorism, 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.[105]

If so, we may observe that the reaffirmation that 'real risk' is sufficient does not explain whether this standard implies 'more likely than not' or even 'beyond reasonable doubt' or otherwise.

We may further observe that *N* v. *UK* strongly suggests that balancing does take place in medical cases. Here, as in *refoulement* cases, the standard is 'real risk'. But it is far from lenient. According to the Court, 'it should maintain the high threshold set in *D* v. *the United Kingdom* and applied in its subsequent case law'.[106] A mere dramatic deterioration in the applicant's health does not suffice to make the appeal succeed; additionally, 'very exceptional circumstances' showing 'compelling humanitarian' considerations are required. In the only medical case where appeal to Article 3 proved successful, *D* v. *UK*, the

> very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.[107]

In *N* v. *UK* it was established 'that if the applicant were to be deprived of her present medication her condition would rapidly deteriorate and she would suffer ill-heath, discomfort, pain and death within a few years', and that in Uganda medication was received by only half of those in need of it.[108] N claimed that medication would not be available in the part of the country where she could settle, and that she could not expect any family support. Nevertheless,

105 *Saadi*, *supra* note 1, at 140.
106 *N v. UK*, *supra* note 2, at 43.
107 Ibid., at 42.
108 Ibid., at 47.

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> [t]he rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.[109]

Her appeal accordingly failed.

It appears that in medical cases a chance that the applicant's situation will not be so dire as to reach the minimum level of severity required by Article 3 (see section 6) seems enough to deny a claim – the statement that that will happen is dismissed as 'speculation'. It will be remembered that in *Saadi* the Court had ruled that the 'speculative' character of risk assessment could not affect it. What is required in medical cases – and hitherto has been satisfied in D's case only – is certainty or near-certainty. This is a very high threshold indeed, certainly in comparison to e.g. *Soering*.

There can be no doubt that balancing takes place also in *refoulement* cases. The lower the degree of risk required, the more protection the provision offers. Apparently, then, the interest of being protected is weighed against other interests. The Court's observation in *Edwards* ('the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities') suggests that it concerns, again, the means invested – the interests of society as a whole. So some factors are involved in this balancing test, whereas others are not. On which grounds and by which criteria other interests competing with the individual's interest in human rights protection are allowed or barred cannot be deduced from the case law. Could, for example, the number of people who could successfully invoke the prohibition of *refoulement* have a role? When the Court discussed the question of whether Article 9 implies a prohibition of *refoulement* (hence could prohibit expulsion in case of real risk that the applicant's freedom of religion would be breached upon return), it remarked *inter alia* that

> [*o*]*n a purely pragmatic basis*, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention.[110]

The 'pragmatic basis' arguably refers to costs and numbers.

### 5.5. Risk assessment and security threats

In sum, it is quite unclear which standard is actually set by 'real risk'. The requirement to render the protection by the provision 'practical and effective' and its 'fundamental' importance call for lenience. But in some cases it must be established 'beyond reasonable doubt' that ill-treatment will occur; in medical cases near-certainty is required, as a lower threshold would result in too great a burden for the state; in *refoulement* cases the standard seems to be less demanding. The 'real risk' criterion is hence a quite open standard. The Court seems to enjoy a certain discretion when applying it – which it recognized in *Saadi*, where it stated in reply

109 Ibid., at 50.
110 *Z and T v. UK*, Decision of 28 February 2006, [2006] ECHR (appl. no. 27034/05) (emphasis added).

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to the UK argument that '[t]he Court sees no reason to modify the relevant standard of proof',[111] and in *N* v. *UK*, where it stated that 'it considers it should maintain the high threshold set in *D.* v. *United Kingdom*' in medical cases.[112]

Does it follow that the United Kingdom is right and that the risk of ill-treatment can be balanced against the threat to public order posed by *Saadi*? The Court stated that this reasoning is incorrect; the notions of risk and of dangerousness are conceptually different. In terms of consistency, the Court is doubtless right. In both medical and domestic cases, the interest of protection of public order is not relevant. Thus the crimes committed by D and Edwards were not relevant for deciding about foreseeability. But in the absence of any criteria for deciding which factors are involved in the balancing, it is not clear why this is so. At any rate, reference to the absolute character of Article 3 cannot do.

## 6. Personal conduct and the qualification as ill-treatment

In *Soering* the Court stated that the purpose of bringing criminals to justice was a factor relevant for qualifying the feared treatment as ill-treatment. Alongside the United States, Germany had requested his extradition – Soering was a German national. As the death sentence did not exist in Germany, death row and ill-treatment would not threaten him there. The Court concluded that

> the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.[113]

Put otherwise, the United Kingdom would not strike a fair balance when extraditing Soering to the United States, because it had an alternative – extradition to Germany – that would satisfy the general interest just as well.

The United Kingdom relied on this reasoning in both *Chahal* and *Saadi* when it stated that the conduct of the expellee was relevant. Discussion of this argument requires answers to two questions: first, does qualification as ill-treatment allow for balancing, and second, if balancing is allowed for, is the conduct of the applicant a relevant factor? The Court rejected this argument in both cases, referring to the 'absolute nature' of Article 3 ECHR, which implies a negative answer to both questions.

### 6.1. The relativity of the minimum level of severity

A whole array of acts and treatments can constitute torture or inhuman or degrading treatment or punishment – beating, rape, detention conditions, whole-life sentences,

111 *Saadi*, *supra* note 1, at 140.
112 *N v. UK*, *supra* note 2, at 43.
113 *Soering*, *supra* note 16, at 111.

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destruction of a home.[114] According to the case law, acts qualify as ill-treatment if they cause a certain amount of 'suffering' or 'humiliation'. Inhuman or degrading treatment is hence defined by the effect of the act or treatment upon the individual subjected to it.

The treatment must 'reach a minimum level of severity' in order to qualify as 'inhuman' or 'degrading'. This minimum is, as the Court has repeatedly stated, 'relative': 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.[115]

Does this 'relativity' of the minimum level of severity detract from the 'absolute' nature of Article 3, and hence imply a limitation or balancing as meant by the UK government? There is, arguably, no reason to suppose so. As the prohibition is defined by means of the effect a certain treatment has on the individual, its qualification as ill-treatment depends on the circumstances of the case and the features of the person concerned. Thus in *Mayeka and Mitunga* the Court ruled that detention of an unaccompanied five year-old child constitutes inhuman treatment,[116] whereas detention under the same conditions would not (or not necessarily) do so for an adult, or the same child if accompanied by its parents. In the latter case the underlying reasoning is not that detention of the child is as such inhuman but justified by the presence of its parents. Rather, the detention of the accompanied minor would not cause fear and anguish. The minimum level of severity is, however, subject to another form of relativity:

> In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.[117]

Thus detention conditions may 'inevitably' cause a certain amount of suffering or humiliation, which do not constitute 'inhuman or degrading treatment' if those conditions are 'legitimate'. If not 'legitimate', however, the same treatment causing the same degree of suffering or humiliation is in violation of Article 3 ECHR.

How does the Court establish whether treatment goes beyond the 'inevitable' and becomes inhuman or degrading? The case of *Jalloh* may serve as an example. It concerned a man who swallowed a small plastic bag when being arrested. The police assumed that this bag contained hard drugs, and the attorney ordered the administration of emetics by a doctor in order to make Jalloh regurgitate the bag and thus enable the evidence to be retrieved. Is this inhuman or degrading treatment? The Court states that in general,

> [w]ith respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to

114 See Van Dijk et al., *supra* note 99, at 406–12, with references to case law.
115 *Saadi*, *supra* note 1, at 134; *Jalloh v. Germany*, Judgment of 11 July 2006, [2006] ECHR (appl.no. 54810/00), at 67.
116 *Mubilanzila Mayeka and Kaniki Mitunga*, Judgment of 12 October 2006, [2006] ECHR (appl. no. 13178/03), at 55 and 58.
117 *Saadi*, *supra* note 1, at 135.

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> protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation . . . A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading . . . This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with.[118]

Hence treatment administered on purpose against the applicant's will that causes him severe suffering is not inhuman or degrading, if there is a medical necessity. But, also, in the absence of medical necessity,

> the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence. However, any *interference with a person's physical integrity* carried out with the *aim* of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was *necessary* to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health . . . In the light of all the circumstances of the individual case, the intervention must not attain the minimum level of severity that would bring it within the scope of Article 3.[119]

After addressing these factors in detail, the Court concluded that the administration of emetics constituted both degrading and inhuman treatment.

### 6.2. The right to personal and physical integrity

We may observe that the Court applies the same scheme as it applies under Article 8 or other Convention provisions that allow for limitations: first, qualification of an act as interference with the right the provision serves to protect and, second, application of a proportionality test to see whether the legitimate aim pursued justifies this interference. Here, the medical treatment is qualified as an 'interference with a person's physical integrity'. Article 3 ECHR does not state which right is protected; in *Tyrer*, the Court stated that the provision serves to protect 'a person's dignity and physical integrity'.[120] This interference is justified if it serves a legitimate aim – here medical necessity or obtaining evidence, in other cases detention of convicts – and is 'necessary' to reach this aim. This is a proportionality test, which includes such factors as the severity of the interference, as well as assessment of the availability of subsidiary means (in this case, just waiting 'for the drugs to pass out of the system naturally').

Hence qualification for inhuman and degrading treatment may involve the application of a balancing test which is no different from the one applying under the non-absolute Convention provisions. Before addressing the question of what this

118 *Jalloh*, *supra* note 115, at 69.
119 Ibid., at 76 (emphasis added).
120 *Tyrer v. UK*, Judgment of 25 April 1978, [1978] ECHR (Ser. A.26), at 33.

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entails for the absoluteness of the prohibition of *refoulement*, we should first consider whether this holds true for only a few or for all qualifications under Article 3 ECHR. In this context it must be remembered that 'legitimate' treatment causing suffering is not inhuman or degrading unless this suffering is more than 'inevitable'. If put in the scheme of the non-absolute rights, these factors all serve as limitations. One commentator suggests that *Jalloh* (and the same could hold for similar cases) concerns a sort of extension of the protection of Article 3 ECHR: an act that does not 'in itself reach the minimum level of severity' may nevertheless do so due to 'arguments that do not concern the intrinsic features of the treatment and its impact', such as arguments on proportionality and subsidiarity.[121] But if an act 'in itself falls within the scope of Article 3', such factors as the seriousness of the case (such as a terrorist attack) or the dangerousness of the person concerned cannot have the effect that the act is not in violation of Article 3 ECHR. Hence a distinction should be made between acts that 'in themselves' qualify as inhuman or degrading treatment, and acts that do not (but that may qualify after a proportionality test). This reasoning may be very close to the thinking of the Court, but, arguably, such a distinction is impossible to maintain. Description of a treatment as 'medical treatment' (hence not in itself within the ambit of Article 3) is already a qualification – a qualification in terms of a justification (or limitation) that may apply. Conversely, 'beating' does not in itself qualify as inhuman treatment – it will not qualify if there is medical necessity or, perhaps, if it was not done on purpose, but it will if it concerns treatment of a prisoner by a guard.

Does qualification as torture involve the same type of balancing? Arguably, it does. Torture differs from inhuman and degrading treatment as regards the greater intensity of suffering inflicted, and because it is inflicted intentionally.[122] Of course, if the suffering is more intense, it is less likely to be proportionate to the legitimate aim pursued (obtaining evidence, detention), and the same may apply to the intention to commit the act. Even so, there is no line separating, for example, medical treatment from torture. Even very heavy pain that is intentionally inflicted may in very special circumstances be justifiable – for instance, when a surgeon deems an operation to be necessary to save the patient's life and cannot anaesthetize him. It should be noted that this does not mean that such torture as Saadi feared (repeated beating in the Tunisian prison, cigarette burns on arms and legs) or rape or Palestinian hanging is justifiable. It follows from Article 3 ECHR that torture is never justified. But facts do not bear the label of torture or rape or Palestinian hanging. Qualification is needed to decide whether or not they disclose examples of 'torture'. This qualification entails an assessment as to whether justifications for these facts apply, explicitly (as in *Jalloh*)

121 P. H. van Kempen, 'Jalloh t. Duitsland', (2007) 32 *NJCM Bulletin* 354, at 365–6, author's translation.

122 Cf. *Ireland v. UK*, *supra* note 11, at 167: '[the distinction between torture and inhuman or degrading treatment] derives principally from a difference in the intensity of the suffering inflicted . . . it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.

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or implicitly (as in *Saadi*). In many cases the facts may seem to speak for themselves – I cannot think of a justification for 'cigarette burns' on prisoners' arms. But the matter may be different for 'burns' on the arms of patients.

It appears that qualification as torture or inhuman and degrading treatment involves application of the scheme applying to derogable rights: interferences can be justified if they serve certain aims and are proportionate to those aims. This arguably holds true also in cases where no explicit reference is made to justifications (which do not appear in torture cases): qualification under Article 3 ECHR always requires the implicit assumption that the act is unjustifiable.

### 6.3. The relevance of terrorist activities for qualification as ill-treatment

Returning to the UK arguments for balancing the alleged threat posed by Saadi to Italy and his right to physical integrity, we may observe that the 'absolute nature' of Article 3 ECHR does not preclude that qualification of acts as ill-treatment implies a balancing act that is similar to the one applied under Article 8. Therefore the second assumption must be addressed: the relevance of Saadi's (alleged) terrorist activities to the application of the prohibition of *refoulement*.

Can terrorist activities or the behaviour of the person concerned influence qualification under Article 3 ECHR according to the Court's case law? Obviously, they can. In *Messina* the Court addressed the isolated detention of a member of 'Mafia-like organizations', sentenced *inter alia* for the murder of a judge, who was placed under a special regime and deprived of most opportunities for contact with others, and considered this isolation to be inhuman or degrading treatment. The Court reasoned:

> The applicant was placed under the special regime because of the very serious offences of which he had been convicted or with which he had been charged, in particular crimes linked to the Mafia. He was prohibited from organising cultural, sporting or recreational activities since his encounters with the other prisoners could be used to re-establish contact with criminal organizations . . . [As to] the suspension of work, the Court notes that the special regime normally entails only the prohibition of handicrafts requiring the use of dangerous tools and that the applicant does not in fact claim to have been excluded from work altogether. It considers that this partial prohibition was justifiable, since the risks caused by the presence of dangerous tools in a prison's high-security wing cannot be underestimated.[123]

Isolation of persons convicted of terrorist activities could likewise be justified. The threat to public order or security in the contracting state posed by the person concerned is therefore relevant to the qualification of treatment as inhuman or degrading in these domestic cases. But the case of *Soering* and the standpoint of the UK government in *Chahal* and *Saadi* is different in so far as the threat to public order in the expelling state may serve as justification for treatment in the receiving state. In *Chahal*, the Court flatly denied that such balancing is possible, because of the 'absolute nature' of the provision. As certain treatment may be justified by personal conduct in cases under Article 3 in the domestic sphere, this reasoning is

123 *Messina v. Italy*, Decision of 8 June 1999, [1999] ECHR (Rep. 1995-V).

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not convincing. In *Saadi*, the Court stated that it

> 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.[124]

This reasoning can be understood as follows. Certain treatment in the receiving state (here, Tunisia), such as solitary confinement, can be justified under local circumstances – that is, if the expellee poses a threat to local public order or national security that justifies this treatment. Only this balancing is allowed for. If the expellee has committed only a minor offence that does not justify solitary confinement, it amounts to ill-treatment and expulsion is not allowed. Threats to public order in the expelling state (Italy) cannot tip the balance, for it would double the possibility for balancing and hence introduce double standards for domestic and foreign cases. The absolute character of Article 3 means in such cases that once treatment qualifies as ill-treatment under local circumstances, Article 3 prohibits expulsion.

There may be good grounds for reasoning so, but it should be noted that it hinges on the statement that security concerns in the domestic state cannot play a role in the qualification of an act as ill-treatment in expulsion cases – in contrast to security concerns in domestic cases. Why is this so? We saw earlier that the Court reasoned otherwise in *Soering*, relying on the search for a fair balance inherent in the whole of the Convention. We may suppose that this search for a fair balance finds expression in the possibility of balancing a threat to domestic public order against infringements on personal integrity in domestic cases. Why can some factors serve as justifications and others not? In the case of *Saadi*, the United Kingdom had stated that the rights of Saadi under Article 3 had to be balanced against those secured to all other members of the community by Article 2. Possibly the right to life of the Italians was not at stake or application of the proportionality test would yield a breach of the right to respect for one's integrity. What matters here is another point: the refusal of the Court even to consider the issue – why a terrorist threat does not count among the 'indisputable imperatives'. Maybe there are good arguments for so holding, but the absolute nature of Article 3 ECHR cannot serve as an explanation.

## 7. Concluding remarks

### 7.1. Absoluteness and balancing in the Court's case law: an appraisal

What results does this analysis of the Strasbourg case law yield as regards the 'absolute nature' of the prohibition of *refoulement* under Article 3 ECHR? If anything, it shows that the absolute character of the provision does not preclude each and every

124 *Saadi*, *supra* note 1, at 138.

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form of balancing of interests. Although the search for a fair balance is explicitly referred to in only few cases, application of the prohibition involves balancing in three respects. First, as regards the assessment of whether there is a real risk that the expellee will be subjected to ill-treatment upon return, the expellee's interest that the risk is rigorously assessed is balanced against the general interest of limiting resources invested in this assessment. Second, as regards the standard of proof, the interest of the expellee with a low or lenient standard of proof is balanced against the same general interest. Third, the qualification of an act as torture or inhuman or degrading treatment or punishment requires balancing: interests such as medical necessity or the general interest to detain criminals or obtain evidence are balanced against the right to respect for one's personal and physical integrity.

In the terms of the application scheme explicitly laid down in Articles 8–11 ECHR (and implicitly applying to e.g. the right to access to the Court of Article 6 ECHR) application of Article 3 ECHR takes place in two steps: qualification of the act as interference with the right to personal and physical integrity, and assessment of whether this interference serves a legitimate aim and is proportionate to it. If the interferences are not justified, the act is to be described ('qualified') as torture or inhuman or degrading treatment. In the terms of this scheme, Article 3 ECHR hence defines unjustifiable interferences or breaches, and their designation as absolute is a truism: it amounts to stating that if it turns out that a limitation of a right is not justified, the limitation is not allowed. To that extent, the difference between 'absolute' and qualified provisions is one of technique. Where justifications for interference in the right to respect for family life are based on the text of the Convention, similar justifications are based on the underlying notion of the search for a fair balance when it comes to Article 3 ECHR.

Yet it does not follow that the designation of Article 3 ECHR as 'absolute' is meaningless. If the search for a fair balance makes sure that important general interests can be taken into account even where Article 3 ECHR is concerned, the 'absolute' character emphasizes or adds weight to the interests of the individual concerned. The 'absolute' character of the provision serves as an argument, if not the decisive argument, for including *refoulement* within the scope of Article 3 in *Soering*, and medical cases in *D* v. *UK*. This argumentative relevance comes to the fore most obviously as regards justifications. We saw above that a number of interests may justify interferences with the right to integrity as protected by Article 3 ECHR: the financial burdens for states, medical necessity, prosecution. These are fewer than the interferences allowed under Article 8 ECHR – and reference to the 'absolute character' makes it possible to keep it that way. For the text of Article 8 presupposes that many interests may serve to justify interference: national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others. The prohibition of *refoulement* under Article 3 ECHR as an 'absolute' prohibition presupposes that no justification applies. The frequent references to the absolute nature of Article 3 ECHR in *Saadi* are typical: it amounts to stating that the main rule (no justifications) applies.

One may feel that the judgment would have been more consistent with the other case law if the Court had explained why this particular justification does not constitute another 'indisputable imperative', and hence would allow states to detract from the main rule. This approach is typical: the Court often employs the terms 'balancing' and 'absoluteness' in a strategic way. The freedom to balance interests that states enjoy in procedural matters is, except for *N* v. *UK*, not labelled as such, nor are criteria for their use of this discretion worded. The absence of clear references to balancing not only obscures the fact that balancing takes place, it also obscures the huge amount of discretion at the Court's disposal. But the absolute or fundamental character of the prohibition is emphasized when the Court identifies limits to this discretion and singles out procedural obligations. Again, the 'absolute' character is an argument for an inclusive reading.

### 7.2. The necessity of balancing: the framers of the Convention

A number of dissenters to *N* v. *UK* stated that it is simply wrong to assume that Article 3 ECHR allows for balancing. Arguably, they were mistaken. Why the absolute character of the prohibition does not and cannot preclude any form of balancing is nicely captured by the following episode in the drafting history of the provision. In August 1949 the Assembly of the Council of Europe discussed a proposal for Article 2, the predecessor of Articles 1 and 3 of the ECHR submitted by the drafting Committee: 'In this Convention, the member states shall undertake to ensure to all persons residing in their territories: (1) Security of person, in accordance with Articles 3, 5 and 8 of the United Nations Declaration.'[125] Article 5 of the UDHR states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' One member, Mr Cocks from the United Kingdom, proposed various amendments of the draft texts as well as motions to be passed by the Assembly, condemning particular forms of torture, such as administering drugs by force or without knowledge or consent, and sterilization. He explained his amendments in a speech on 'the retrogression into barbarism' in the Nazi era which greatly moved the members of the Assembly.[126] Most of his proposals were rejected, some because the Assembly felt that too much emphasis on freedom from torture or on particular forms of torture could weaken other rights contained in the text. But there were also other reasons. Assembly members from Denmark and Norway remarked that in their states sterilization was lawful, and its condemnation should therefore be deleted.[127] The representative of Sweden added, 'There is in some countries legislation for the sterilizing of sexual criminals in the interests of public security . . . it would be unfortunate to agree to that paragraph of the Motion without a study of the new social legislation which, in my country at least, is considered to demonstrate considerable progress.'[128] A Belgian member insisted thereupon that

125 Assembly Docs. 1949, 77, at 204 and Doc. A.290 at 12, as quoted by the European Commission on Human Rights in its 'Memorandum on Article 3 ECHR', DH(56)5, of 22 May 1956, 2, available at www.echr.coe.int/Library/COLENTravauxprep.html (last visited 20 April 2008).

126 CR 1949, at 1178–80, as rendered by the EComHR in DH (56)5, at 5 f. (see previous note).

127 Ibid., at 9.

128 Ibid., at 12.

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the condemnation be maintained: 'when we talk of sterilization, let us not forget that it was an innovation of the Nazi regime'.[129] The Assembly decided to refer the matter to the drafting Committee which adopted Article 3 ECHR as we know it, without discussing it further.[130]

This episode shows that an unequivocal or 'absolute' prohibition of torture and inhuman and degrading treatment and punishment is possible only in abstract terms. A translation into a prohibition of specific acts would apparently be over-inclusive: the Scandinavian sterilization programmes, which seemed to be justified as they served legitimate aims, or aims considered legitimate in those days, had to fall outside it. To strike out sterilization altogether could imply that it would not constitute ill-treatment, but sterilization schemes as operated by the Nazis had to be prohibited. Codification of this outcome would have amounted to inserting a balancing scheme as adopted for Articles 8–12 of the Convention, hence at the expense of the absolute prohibition of 'retrogression into barbarism'. The Court's insistence on the absolute nature of the prohibition in all its case law, while tacitly (in most cases) or explicitly (in *Soering*) applying a fair balance test, repeats this tension faced by the Article's drafters.

### 7.3. Balancing and absolute prohibitions: the Human Rights Committee and the Commission against Torture

Is balancing of interests while insisting on the absolute character of the prohibition of *refoulement* particular to the reasoning of the Strasbourg Court? Arguably, it is not. Some sort of balancing necessarily takes place, openly or, if the absolute character of some prohibition is to be upheld, covertly. This applies to the other absolute prohibitions under the European Convention, and to absolute prohibitions in general international law such as Article 7 ICCPR (the prohibition of ill-treatment) and Article 3 CAT (the prohibition of expulsion in case of danger of torture upon return). Indeed, the same type of reasoning can be discerned in views on the matter by the Human Rights Committee and the Commission against Torture, those UN treaty-monitoring bodies that have addressed the prohibition of *refoulement*. Both bodies have repeatedly stated that prohibitions of *refoulement* of Articles 7 ICCPR and 3 CAT are 'absolute'. The issue was brought to the fore after the notorious *Suresh* decision of the Canadian Supreme Court, holding that expulsion of an alleged terrorist who would face torture after removal was allowed for, taking into account the threat he posed to national security, notwithstanding the absolute prohibition of Article 3 CAT.[131] Both the HRC and the CAT condemned this application, stressing the absolute character of the provision.[132] But analysis of the views issued by both bodies reveals the same type of implicit balancing as is found in the judgments of the Strasbourg Court. Thus complainants bear the burden of proof and have to meet a certain probability test. So despite the absolute character of the prohibitions, the

129 Ibid.
130 Ibid., at 14–18.
131 *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1. File No. 27790.
132 CAT, *Bachan Singh Sogi v. Canada*, 279/2006, para. 10.2; HRC State report, ICCPR/C/CAN/2004/5.

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state's duty to assess appeals to them is mitigated. Just like the Strasbourg Court, the monitoring bodies do not explain why states must fulfil just these requirements. And the qualification of acts as torture or inhuman or degrading treatment or punishment at times also bears testimony to implicit balancing.[133]

The views and comments of both bodies are far less detailed on the arguments and argumentations underlying the scope and application of the prohibition of *refoulement*; those views are far more concise than the often very comprehensive judgments of the European Court of Human Rights. But as the text of the provisions is (as is relevant for present purposes) similar to Article 3 ECHR, the structural tension between upholding the condemnation of ill-treatment and accommodating competing interests is inherent in all *refoulement* cases, and the outcomes are fairly comparable, the analysis of the Strasbourg case law provided for here may be relevant for understanding the implications of general international law as regards *refoulement* as well – and for any other absolute prohibition.

133 For example, the Human Rights Committee in its General Comment 7 addresses several types of ill-treatment, including 'excessive chastisement as an educational or disciplinary measure'. It appears that chastisement is allowed if it is legitimized by its aim as an educational or disciplinary measure, and if its is proportionate to it, i.e. not 'excessive' (General Comment 7, Sixteenth session, 1982, 'Article 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment', A/37/40 (1982) 94).