

The protection from removal to unsafe countries under the ECHR: not all that glitters is gold

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1. *From 'nothing to Soering': the smart idea of the so called 'protection par ricochet' and the judicial dynamism of the Strasbourg Court in immigration and asylum matters*

It is well-known that, unlike the Universal Declaration of Human Rights, the European Convention on Human Rights (hereinafter 'ECHR') does not contain an express provision on the right to asylum.¹ Moreover, unlike other human rights treaties,² the ECHR does not contain either an express provision on the protection of aliens from removal to countries where they would face the risk of being subjected to persecution or to serious human rights violations.

Although the contracting States have the right, as a matter of well-established international law, to control the entry, residence and expulsion of aliens and although the right to asylum is not as such guaranteed

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¹ Art 14 of the Universal Declaration of Human Rights (UN General Assembly, Res 217 A(III) of 10 December 1948) reads as follows: '1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

² See, for instance, art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (hereinafter, 'UNCAT'), and art 22 para 8 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.



by the ECHR or its Protocols,³ the Strasbourg organs have developed an extensive case-law concerning the obligation of States Parties not to extradite, expel or return an alien to ‘unsafe’ countries, shaping what is nowadays regarded as the most advanced system of protection against removal under international law.

This development was made possible thanks to the functional interpretation of the ECHR as an instrument for the collective enforcement of rights that are ‘practical and effective’, and not ‘theoretical or illusory’. While from the early years of its functioning the European Commission had stated that the removal of a person ‘may, in certain exceptional cases, be contrary to the Convention and in particular to Article 3’,⁴ it was only in the late eighties that, for the first time, the European Court of Human Rights (hereinafter ‘ECtHR’ or ‘the Court’) found a breach of that provision as a result of an extradition that would have exposed the applicant to a risk of being subjected to ill-treatment in the receiving State, relying on an interpretation of the ECHR that was later commonly referred to in the literature as the ‘protection *par ricochet*’.⁵

In the famous *Soering* case, the Court reiterated that no right not to be extradited is as such protected by the ECHR, but stated that, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a ECHR right, it may, ‘assuming that the consequences are not too remote’, attract the obligations of a Contracting State under the relevant ECHR provision. According to the Court, the application of the ECHR in matters of extradition stems from its ‘special character as a treaty for the collective enforcement of human rights and fundamental freedoms’, whose provisions must be ‘interpreted and applied so as to make its safeguards practical and effective’ and in consistency with

³ See, among other authorities, *Vilvarajah and others v the United Kingdom*, App nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30 October 1991), paras 102-103, *Salah Sheekh v the Netherlands*, App no 1948/04 (ECtHR, 11 January 2007), para 135, and *A. v the Netherlands*, App no 4900/06 (ECtHR, 20 July 2010), para 141.

⁴ See, for instance, *Hopfinger v Austria*, App no 434/58 (EComHR, 30 June 1959), and *X v Belgium*, App no 858/60 (EComHR, 13 April 1961).

⁵ See notably G Cohen-Jonathan, *La Convention européenne des droits de l’homme* (Presses Universitaires d’Aix-Marseille 1989) 84 and 304, and F Sudre, ‘Extradition et peine de mort: arrêt *Soering* de la Cour européenne des droits de l’homme du 7 juillet 1989’ (1990) 94 *Revue Générale de Droit International Public* 103, 108.



the ‘general spirit’ of the ECHR as an instrument ‘designed to maintain and promote the ideals and values of a democratic society’.⁶

This is particularly true when the protection against torture and other inhuman or degrading treatment or punishment enshrined in Article 3 ECHR is engaged, since ‘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’.⁷

The same principles laid down in *Soering* were then reiterated by the Court’s case-law, also with regard to measures of expulsion or deportation (irrespective of their formal qualification). Notably, the Court has made clear that a violation of Article 3 ECHR may occur in any case where a person is removed to another country notwithstanding the existence of ‘substantial grounds’ for believing that the removal would expose such a person to the ‘real risk’ of being subjected to torture or to other proscribed treatment in the receiving State (being it the State of nationality or the State of transit).⁸

In such cases, the Court is called upon to assess the situation existing in the receiving State in light of the imperatives of protection imposed by Article 3 ECHR. However, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the ECHR or otherwise, given that ‘in so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its

⁶ See, *Soering v the United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989), para 85.

⁷ See *ibid* paras 88 and 91.

⁸ See *Cruz Varas and others v Sweden*, App no 15576/89 (ECtHR, 20 March 1991), para 69; *Vilvarajah (n 3)*, paras 107-108; *Chahal v the United Kingdom*, App no 22414/93, paras 95-97; *Ahmed v Austria*, App no 25964/94 (ECtHR, 17 December 1996), para 39; *Hilal v the United Kingdom*, App no 45276/99 (ECtHR, 6 March 2001), paras 59-60; *Abdolkhani and Karimnia v Turkey*, App no 30471/08 (ECtHR, 22 September 2009), para 72.



having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment'.⁹

As will be explained in the following paragraph, the ECtHR has relied extensively on the principles laid down above with a view to broadening the protection *par ricochet* of aliens against measures of removal. As a result, despite the absence of an express provision on the right to asylum or on the prohibition of *refoulement*, the ECHR has gained a leading role in this field, taking precedence over the Geneva Convention on the status of refugee¹⁰ and the UN Convention against torture.¹¹

The mounting judicial dynamism of the Court in immigration and asylum matters over the last two decades is less and less tolerated by the contracting States, who have recently expressed their discontent by inviting the Court, when examining cases of removal, 'to assess and take full account of the effectiveness of domestic procedure and, where these procedures are seen to operate fairly and with respect for human rights,

⁹ See *Saadi v Italy*, App no 37201/06 (ECtHR, GC, 28 February 2008), para 126, and *Mamatkulov and Askarov v Turkey*, App nos 46827/99, 46951/99 (ECtHR, GC, 4 February 2005), para 67.

¹⁰ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150. The prohibition of *refoulement* under the Geneva Convention can only be relied upon by a person who meets the requirements of eligibility as a refugee in accordance with art 1 of the Convention and can be subjected to restrictions pursuant to art 33 para 2 of the Convention, while the prohibition of removal under the ECHR applies in absolute terms irrespective of whether the person concerned is eligible to refugee status and irrespective of the gravity of his/her conduct. As pointed out by the Strasbourg Court, 'the conduct of the person concerned, however indesiderable or dangerous, cannot be taken into account, with the consequence that the protection afforded by art 3 is broader than that provided for in arts 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees' (see *Saadi* (n 9), para 138).

¹¹ The prohibition of *refoulement* under art 3 of the UNCAT only applies to cases in which the person may face 'torture' in the receiving State, since art 16 of the Convention does not include art 3 among the provisions which apply also to 'cruel, inhuman or degrading treatment or punishment'. As the Committee against Torture has reiterated several times, 'the scope of the non-refoulement obligation described in article 3 does not extend to situations of ill-treatment envisaged by article 16. Accordingly, the claims under articles 2 and 16 relating to the expulsion of the complainant are inadmissible *ratione materiae* as incompatible with the provisions of the Convention' (see CAT, *T.M. v Sweden*, 228/2003, Decision 18 November 2003; see also M Fornari, 'La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti', in L Pineschi (ed), *La tutela internazionale dei diritti umani. Norme, garanzie e prassi* (Giuffrè 2006) 203, 209).



to avoid intervening except in the most exceptional circumstances'.¹² This negative reaction is arguably a positive sign of the far-reaching character of the limitations imposed by Strasbourg's case-law on the States' power to control the entry and removal of aliens from their territory.

However, not all that glitters is gold. The gradual expansion of the protection *par ricochet* generated a number of side-effects that risk undermining the consistency of the Court's jurisprudence and even the absolute character of the prohibition of torture and inhuman or degrading treatment, which is at the core of the ECHR's values. Some of these side-effects will be addressed in the final paragraph.

2. *The 'generous' jurisprudence of the ECtHR concerning the prohibition of removal to unsafe countries*

a) *The sources of the risk*

The jurisprudence of the ECtHR concerning the scope of the protection afforded by the ECHR against removal of aliens to unsafe countries is abundant and multi-coloured.¹³

In addition to the more traditional situations where the risk of proscribed treatment stems from the conduct of the public authorities of the receiving State, the Court has admitted that Article 3 ECHR can also be engaged in cases where the said risk originates from the conduct of non-state actors.¹⁴

¹² See Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights, organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, Izmir, Turkey, 26-27 April 2011, para A.3 of the Follow-Up Plan.

¹³ See, for instance, *Handbook on European Law Relating to Asylum, Borders and Immigration* (EU Fundamental Rights Agency/European Court of Human Rights/Council of Europe 2014); N Mole, C Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010) 25 ff; A Fronerod, 'L'article 3 de la Convention européenne des droits de l'homme et l'éloignement forcé des étrangers: illustrations récentes' (2010) 82 *Revue Trimestrielle des Droits de l'Homme* 315.

¹⁴ On the Court's case-law concerning the risk of ill-treatment stemming from the conduct of private individuals or entities in the receiving State see, in particular, R McCorquodale, R La Forgia, 'Taking off the Blindfolds: Torture by Non-State Actors' (2001) 1 *Human Rights Law Review* 189.

Notably, starting from the *H.L.R.* case, the Court clearly stated that '[o]wing to the absolute character of the right guaranteed, [it] does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials'.¹⁵ Later on, the Court clarified that 'the existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, directly or indirectly, of the authorities of the receiving country'.¹⁶

However, in those instances, the Court requires particularly convincing evidence as to the fact that the receiving State is not able or willing to afford the person concerned an adequate degree of protection against the risk of ill-treatment administered by private individuals¹⁷ or entities.¹⁸ Notably, it must be shown that 'the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.¹⁹

The protection *par ricochet* was further expanded by the Court in relation to cases where the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that countries, or which, taken alone, do not in themselves infringe the standards of Article 3 ECHR.

The first case worth mentioning in this respect (a case that remained unique in the Court's case-law) concerned a national of St. Kitts (D.) who was in the advanced stage of a incurable and terminal illness and

¹⁵ See *H.L.R. v France*, App no 24573/94 (ECtHR, 29 April 1997), para 40.

¹⁶ See *Salah Sheekh* (n 3), para 147.

¹⁷ See, for instance, *Njie v Sweden*, App no 47956/99 (ECtHR, 31 October 1999), concerning the deportation of a national of Gambia fearing to be killed by the relatives of his accomplice who had been convicted on account of drug trafficking; *Ali Reza Razaghi v Sweden*, App no 645999/01 (ECtHR, 11 March 2003), concerning the deportation of an Iranian citizen alleging the risk of ill-treatment on the ground that he had a relationship with the wife of a *mullah* and that he had converted to Christian religion; and *Collins e Akaziebi v Sweden*, App no 23944/05 (ECtHR, 8 March 2007), concerning the deportation to Nigeria of a woman that feared to be subjected to the most serious form of female genital mutilation.

¹⁸ See *Ammari v Sweden*, App no 60959/00 (ECtHR, 22 October 2002), concerning the expulsion of an Algerian national who feared being subjected to reprisals by an Islamic group (the GIA – *Groupe Islamique Armé*).

¹⁹ See *Hirsi Jamaa and others v Italy*, App no 27765/09 (ECtHR, GC, 23 February 2012), para 120.



who complained that his removal would expose him to treatment contrary to Article 3 ECHR due to the poor health-care facilities in the island and to the unavailability of his current medical treatment, a situation that would not only hasten his death but also condemn him to spend his remaining days in pain and suffering.

In its judgment,²⁰ the Court found a breach of Article 3 ECHR on the ground that the applicant's removal would expose him to 'a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering'. In light of the fundamental importance of Article 3 ECHR, the Court held that it should reserve for itself sufficient flexibility to address the application of that Article in contexts which might arise other than those in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country.

The subsequent jurisprudence has confirmed in principle the extension of the protection against removal under Article 3 ECHR to the potential risks for the life and limb of the person stemming from the inadequacy of the health-care facilities or from the unavailability of certain medical treatment, but it also pointed out that in such cases a higher threshold is required.²¹

b) The assessment of the risk

The expansive approach followed by the Strasbourg Court in the application of the protection against removal under the ECHR also marked the development of its case-law concerning the criteria for assessing the existence of a 'real risk' of proscribed treatment in the receiving State.

While in general terms the Court held that a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3 and that the applicant should in principle adduce evidence capable of proving that there are 'special distinguishing features' establishing a

²⁰ See *D. v the United Kingdom*, App no 30240/96 (ECtHR, 2 May 1997), para 49.

²¹ See section 3 below; *S.C.C. v Sweden*, App no 46553/99 (ECtHR, 15 February 2000), and *Al-Zawatia v Sweden*, App no 50068/08 (ECtHR, 22 June 2010), para 48.



personal and individualized risk of ill-treatment,²² the more recent case-law has substantially flagged the scope of this requirement in relation to aliens belonging to groups or minorities that are systematically exposed to a practice of serious human rights violations in the receiving country.

Notably, in the *Salah Sheekh* case, the Court revised its previous approach stating that ‘it cannot be required of the applicant that he establishes that *further special distinguishing features*, concerning him personally, exist in order to show that he was, and continues to be, personally at risk [...]’, since such an approach ‘might render the protection offered [by Article 3] illusory’.²³ Later on, in the *Saadi* case, the Court admitted that, in assessing the risk, a decisive importance can be attached to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US Department of State. Moreover, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 ECHR enters into play when that there are serious reasons to believe that the practice in question does exist and that the applicant’s membership to the group concerned is established.²⁴

This innovative approach was later confirmed in the *NA*. case, where the Court clarified that it will not insist that the applicant shows the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3 ECHR and that it will take account of the general situation of violence existing in the receiving country when such situation ‘makes it more likely that the authorities (or any persons of group of persons where the danger emanates from them) will systematically ill-treat the group in question’.²⁵

c) *The absolute character of the prohibition of removal*

It is well-known that Article 3 ECHR prohibits in absolute terms torture and other inhuman or degrading treatment or punishment and

²² See *Vilvarajah* (n 3), paras 111-112

²³ See *Salah Sheekh* (n 3), para 148.

²⁴ See *Saadi* (n 9), paras 128-133.

²⁵ See *NA. v the United Kingdom*, App no 25904/07 (ECtHR, 17 July 2008), paras 116-117. Similarly, see also, *A. v the Netherlands* (n 3), para 144, and *Hirsi Jamaa* (n 19), para 119.



it is listed among those provisions to which no derogation is permitted even in the event of a public emergency threatening the life of the nation (Article 15 ECHR).

The Court's case-law has consistently upheld the absolute and non-derogable character of the prohibition of removal to unsafe countries in all circumstances.

In the *Chahal* case, the Court recognised for the first time that '[t]he prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases' and that, accordingly, 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 ECHR 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 irrespective of 'the activities of the individual in question, however undesirable or dangerous'.²⁶

The same principles have been reaffirmed by the Court in the *Saadi* case despite the objections raised by several contracting States (including the United Kingdom) seeking to lessen the protection afforded by Article 3 ECHR in case of removal of suspected terrorists by allowing State authorities to carry out a balancing test between national security and prevention of risk of ill-treatment.²⁷

Relying on the absolute character of the prohibition of torture and of inhuman or degrading treatment or punishment, the Court concluded that the nature of the offence allegedly committed by the applicant is irrelevant for the purposes of Article 3 ECHR and that the risk of harm in case of his or her removal cannot be balanced against the dangerousness he or she represents to the community, given that the concepts of

²⁶ See *Chahal* (n 8), paras 79-80.

²⁷ See *Saadi* (n 9), paras 124-127. For some comments on this landmark judgment see D Moeckli, 'Saadi v Italy: the Rules of the Game Have not Changed' (2008) 8 Human Rights Law Review 534; F De Londras, 'International Decisions: Saadi v Italy' (2008) 102 AJIL 110; B Concolino, 'Divieto di tortura e sicurezza nazionale: l'espulsione di presunti terroristi' (2008) 2 Diritti Umani e Diritto Internazionale 627; and A Gianelli, 'Il carattere assoluto dell'obbligo di non-refoulement: la sentenza *Saadi* della Corte europea dei diritti dell'uomo' (2008) 91 Rivista di Diritto Internazionale 449.

‘risk’ and ‘dangerousness’ are notions that can only be assessed separately.²⁸

For the same reasons, the Court held that, even when national security is at stake, the absolute nature of the protection afforded by Article 3 ECHR does not allow for a higher standard of proof to be required in order to establish the risk of ill-treatment in case of removal. According to the Court, such an approach would amount to an assertion that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual, while for a planned forcible expulsion to be in breach of Article 3 ECHR it is sufficient to prove the existence of substantial grounds for believing that there is a real risk that the person concerned will be subjected in the receiving country to proscribed treatment.²⁹

d) The risk of violation of other ECHR rights

The application of the protection *par ricochet* in case of removal was further expanded by the Strasbourg case-law to the risk of violation of other rights guaranteed by the ECHR, although with some restrictions.

Starting from the *Soering* case, the Court held that the responsibility of the sending State can also be engaged under Article 6 ECHR where the individual ‘has suffered or risks suffering a *flagrant denial of a fair trial* in the requesting country’.³⁰ In order to raise an issue under the Convention in case of removal a violation of the fair trial guarantees enshrined in Article 6 ECHR must therefore be particularly serious and manifest. For instance, a denial of justice occurs when a person is detained ‘because of suspicions that he has been planning or has commit-

²⁸ See *Saadi* (n 9), paras 137-139. This conclusion is backed up by arts IV and XII of the *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002.

²⁹ See *Saadi* (n 9), paras 140-141. The same principles have been reiterated by the Court in the following case-law: see, among others, *A. and others v the United Kingdom*, App no 3455/05 (ECtHR, GC, 19 February 2009), para 126, *A. v the Netherlands* (n 3), para 142, *Ben Khemais v Italy*, App no 246/07 (ECtHR, 24 February 2009), para 53; *Trabelsi v Italy*, App no 50163/08 (ECtHR, 13 April 2010), para 40.

³⁰ See *Soering* (n 6), para 113 (emphasis added). Similarly, see also *Drozd and Janousek v France and Spain*, App no 12747/87 (ECtHR, 26 June 1992), para 110, where the Court stated that ‘[t]he Contracting States are (...) obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice’.



ted a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release' or when there is 'a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country'.³¹

Moreover, the most recent case-law of the Court seems inclined to broaden further the protection *par ricochet* to the risk for the individual of being subjected in the receiving State to a 'flagrant' violation of other rights protected by the ECHR, such as in particular the right to liberty (Article 5) and the right to freedom of religion (Article 9), even where such a violation does not reach the minimum threshold of severity to fall within the notion of ill-treatment under Article 3 ECHR or within the notion of 'flagrant denial of justice' under Article 6 ECHR.³²

Indeed, whereas in the past the Court had refrained from taking a clear stance on the matter,³³ in the case *Z. and T.* it admitted *in abstracto* the possibility that the responsibility of the returning State might 'in exceptional circumstances' be engaged under Article 9 ECHR 'where the person concerned ran a real risk of flagrant violation of that Article in the receiving State', although stressing that 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would

³¹ See, for instance, *Al-Moayad v Germany*, App no 35865/03 (ECtHR, 20 February 2007), concerning the extradition to the United States of a national of Yemen who was accused of having financed the terrorist activities of Al-Qaeda and Hamas; *Einborn v France*, App no 71555/01 (ECtHR, 16 October 2001), para 32, concerning the extradition of a citizen of the United States to Pennsylvania where he had been convicted *in absentia* for murder; *Cenaj v Albania and Greece*, App no 12049/06 (ECtHR, 4 October 2007), concerning the extradition of the applicant to Albania where he had been convicted *in absentia*.

³² In this respect see G Palmisano, 'Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani' (2009) 3 Diritti Umani e Diritto Internazionale 509, 525.

³³ See *Tomic v the United Kingdom*, App no 17837/03 (ECtHR, 14 October 2003), where the Court expressed doubts as to '[w]hether an issue could be raised by the prospect of arbitrary detention contrary to Article 5' in the receiving State; and *Razaghi v Sweden*, App no 64599/01 (ECtHR, 11 March 2003), and *Francis Gomes v Sweden*, App no 34566/04 (ECtHR, 12 October 2004), where the Court ruled out that the alleged violation of the applicants' freedom of religion following their deportation, respectively, to Iran and to Bangladesh could 'separately engage the Swedish Government's responsibility under Article 9 of the Convention'.



not also involve treatment in violation of Article 3 of the Convention'.³⁴ Similarly, in the *Abu Quatada* case, the Court concluded that, despite the doubts it expressed in its previous case-law, it is possible for Article 5 ECHR to apply in an expulsion case and that, therefore, a Contracting State would be in violation of that provision if it removed an applicant to a country where he or she was at real risk of a 'flagrant breach' of the right to liberty.³⁵

3. *From theory to practice: the 'relative protection' of an 'absolute prohibition'*

a) *The 'higher threshold' in cases involving non-state actors or access to healthcare in the receiving State*

As mentioned before, the far-reaching expansion of the protection *par ricochet* against removal to unsafe countries in the Court's case-law has occasioned a number of downsides in its practical 'sustainability', making such a protection less effective than one might initially imagine. Indeed, the Court's 'generosity' in setting out the relevant interpretative principles in the field of immigration and asylum is often counterbalanced by a narrow application of those principles in practice, which sometimes leads to a substantial downgrade of the practical impact of the protection.

One of the clearest examples in this respect is offered by the opacity of the Court's case-law broadening the absolute prohibition of removal under Article 3 ECHR to cases where the risk of ill-treatment stems

³⁴ See *Z. and T. v the United Kingdom*, App no 27034/05 (ECtHR, 28 February 2006). The Court has substantially deferred to the approach followed by the *House of Lords* in the *Ullah* case, where it admitted that the risk of suffering a flagrant violation of the freedom of religion in the receiving State could as a matter of principle engage the responsibility of the returning State, but it also emphasised that, where art 3 is not at stake, 'a high threshold test will always have to be satisfied' and that it would be difficult to imagine 'a sufficient interference with the Article 9 rights which does not also come within the Article 3 exception' (House of Lords, *R (on the application of Ullah) v Special Adjudicator – Do v Secretary of State for the Home Department*, 17 June 2004, (2004) 16 *International Journal of Refugee Law* 411).

³⁵ See *Othman (Abu Qatada) v the United Kingdom*, App no 8139/09 (ECtHR, 17 January 2012), paras 231-232.



from the conduct of non-state actors or from the objective deficiencies of health-care facilities and medical treatment in the receiving country. In both cases, the Court has significantly heightened the probative threshold required in order to establish the existence of a risk falling within the scope of the prohibition, introducing the concept of ‘exceptional circumstances’ and thereby undermining the absolute character of the prohibition.

Notably, as far as non-state actors are concerned, the Court places upon the applicant an additional evidentiary burden, requiring him to prove that the authorities of the receiving State would not be able or willing to obviate the alleged risk of ill-treatment administered by private individuals by providing ‘appropriate protection’.³⁶ For instance, in the *H.L.R.* case quoted above, the Court found that the applicant’s deportation to Colombia would not be contrary to Article 3 ECHR due to the risk of revenge by drug traffickers, giving weight to the fact that ‘there are no documents to support the claim that the applicant’s personal situation would be worse than that of other Colombians, were he to be deported’ and that, notwithstanding ‘the difficulties the Colombian authorities face in containing the violence’, the applicant had not shown that they were ‘incapable of affording him appropriate protection’.³⁷

With regard to the situations where the source of the risk of proscribed treatment in the receiving country stems from factors ‘which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article’,³⁸ the Court has set an even higher evidentiary threshold. Although the criteria for the assessment of the risk seems to fully correspond to those applied in cases involving non-state actors, it is rather clear that such an assessment is in fact carried out by the Court in a much more restrictive manner where the risk

³⁶ See, for instance, *H.L.R.* (n 15), para 40.

³⁷ See *ibid* paras 41-43.

³⁸ See *D. v UK* (n 20), para 49, and *Bensaid v the United Kingdom*, App no 44599/98 (ECtHR, 6 February 2001), para 40. Similarly, see *Amir Nasimi v Sweden*, App no 38865/02 (ECtHR, 16 March 2004), *Salkic and others v Sweden*, App no 7702/04 (ECtHR, 29 June 2004), *Paramsotby v the Netherlands*, App no 14492/03 (ECtHR, 10 November 2005), and *Limoni and others v Sweden*, App no 6576/05 (ECtHR, 4 October 2007).



of ill-treatment not only is not directly attributable to the public authorities of the receiving country, but is moreover dependent on objective factors (such as, for instance, the poorness of the health-care facilities or the unavailability of certain medical treatment) which do not engage, even indirectly, the responsibility of the receiving State.

For instance, in the *Bensaid* case, the Court acknowledged that the applicant's deportation and the differences 'in available personal support and accessibility of treatment' would arguably increase the risk of relapse, but still it did not consider that the circumstances adduced by the applicant (such as the difficulties he would face to reach the hospital in Algeria that could provide him with the necessary medical treatment and the inability to claim and receive the free medication employed in the UK) were sufficient to establish the risk of proscribed treatment, emphasising that 'the case does not disclose the exceptional circumstances of *D. v. the United Kingdom* (...), where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St. Kitts'.³⁹ In *Karagoz*, the Court further clarified that

'l'examen de la réalité du risque de traitement contraire à l'article 3 de la Convention en cas de maladie grave passe notamment par la vérification de la possibilité, pour la personne concerné, de se procurer les médicaments adéquats à son état de santé et par l'examen partant sur le point de savoir si son état de santé nécessite des soins d'une nature si particulière qu'elle le placerait dans une situation différente de celle vécue par d'autres ressortissant du pays de destination souffrant de semblables maux'.⁴⁰

More recently, the Grand Chamber of the Court has further limited the scope of application of Article 3 ECHR, clarifying that aliens who

³⁹ See *Bensaid* (n 38), paras 37-41.

⁴⁰ See *Karagoz v France*, App no 47531/99 (ECtHR, 15 November 2001), concerning the deportation to Turkey of an individual who had undergone a complex surgical operation. Similarly, see *S.C.C. v Sweden* (n 21) and *Ndangoya v Sweden*, App no 17868/03 (ECtHR, 22 June 2004), where the Court held that 'it does not appear that the applicant's illness has attained an advance or terminal stage, or that he has no prospect of medical care or family support in his country of origin' and that 'the fact that the applicant's circumstances in Tanzania would be less favourable than those he enjoys in Sweden cannot be regarded as decisive from the point of view of Articles 2 and 3 of the Convention'.



are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State ‘in order to continue to benefit from medical, social or other form of assistance and services provided by the expelling State’ and that ‘the fact that the applicant’s circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3’.⁴¹ Accordingly, the removal of an alien affected by a serious illness to a country where the medical treatment of such illness would be much less effective than in the returning State ‘may raise an issue under Article 3 [...] only in a *very exceptional* case, where the humanitarian grounds against the removal are compelling’.⁴²

In conclusion, it seems clear that the more tenuous the ‘link’ between the alleged ill-treatment and the conduct of State authorities, the higher the threshold of risk assessment applied by the Court for the purpose of establishing the responsibility of the returning State under Article 3 ECHR. It is not a coincidence that, except in the *D.* case, the Court has to date not found a breach of Article 3 ECHR in relation to such a situation, excluding the existence of ‘exceptional humanitarian circumstances’ notwithstanding the serious hardship the applicants would suffer in the receiving country.⁴³

One may arguably wonder how an absolute prohibition can be guaranteed only in ‘exceptional circumstances’ and how the higher evidentiary threshold required in cases where the source of the risk is not directly attributable to the authorities of the receiving State can be considered in line with the alleged non-derogability of the protection against removal as conceived by the Court in *Saadi* (where it stated that the protection afforded by Article 3 ECHR does not allow for a higher

⁴¹ See *N. v the United Kingdom*, App no 26565/05 (ECtHR, GC, 27 May 2008), para 42.

⁴² See *Al-Zawatia* (n 21), para 50 (emphasis added).

⁴³ Notably, the Court has declared inadmissible as manifestly ill-founded several applications in which the applicants – affected by HIV – complained about the risk of being exposed to proscribed treatment as a result of the unavailability of adequate medical treatment in the receiving countries. See, for instance, *S.C.C. v Sweden* (n 21) (expulsion to Zambia), *Arcila Henao v the Netherlands*, App no 13669/03 (ECtHR, 24 June 2003) (expulsion to Colombia), *Ndagoya v Sweden*, App no 17868/03 (ECtHR, 22 June 2004) (expulsion to Tanzania), *Amegnigan v the Netherlands*, App no 25629/04 (ECtHR, 25 November 2004) (expulsion to Togo).



standard of proof to be required in order to establish the risk of ill-treatment in case of removal).

b) The 'holistic' approach to ill-treatment and the 'selective' application of the standards

A similar question arises in relation to whether the Court is truly prepared to apply the prohibition of removal to an unsafe country to any possible form of ill-treatment in the receiving country, as the absolute nature of Article 3 ECHR would postulate.

In principle, the difference between torture and inhuman or degrading treatment based on the intensity of the suffering should not bear any relevance with respect to the protection against removal insofar as the applicant is able to establish the existence of a 'real risk' of being subjected to a treatment attaining the 'minimum level of severity' required by the case-law in order to fall within the scope of Article 3 ECHR.⁴⁴ In other words, since any treatment contrary to Article 3 ECHR is prohibited in absolute terms and with no exception, there should be no room for mitigating the protection against removal derived therefrom in cases where the applicant faces a risk of degrading treatment rather than a risk of torture in the country of destination (as happens within the framework of the CAT).⁴⁵

For instance, the protection against removal should apply unconditionally in every case in which, according to its settled case-law, the conditions of detention do not meet the minimum standard of respect for human dignity.⁴⁶

⁴⁴ According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum level is, in the nature of things, 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. See, among other authorities, ECtHR, *Ireland v the United Kingdom*, App no 5310/71 (ECtHR, 18 January 1978), para 162, and *Istratii and others v Moldova*, App nos 8721/05, 8705/05, 8742/05 (ECtHR, 27 March 2007), para 46.

⁴⁵ See n 12.

⁴⁶ Under art 3 ECHR, the State must ensure that 'a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured



The impression, however, is that the Court would be rather reluctant to follow the same standards of assessment of ill-treatment that were elaborated in its case-law and that were intended to apply to the Contracting States. Indeed, the ‘holistic’ approach to the notions of proscribed treatment would lead to a complete ban on removal to any country that does not ensure conditions of detention in line with the (demanding) European standards and would almost certainly exacerbate the mounting discontent of the Contracting States for the increasing limitations of their sovereign powers to control the entry and removal of aliens.⁴⁷

If this is to a certain extent the unavoidable consequence of the ‘relative’ nature of the notions of torture and inhuman or degrading treatment, which also depend on subjective factors and on the evolving living conditions in modern societies,⁴⁸ one should not overlook the risk of a ‘fragmentation’ of those notions for the purpose of a selective application of the protection against removal to unsafe countries, with the requisite level of severity in expulsion and asylum cases elevated to a more onerous level than in non-expulsion contexts.

by, among other things, providing him with the requisite medical assistance’ (see, for instance, *Kudla v Poland*, App no 30210/96 (ECtHR, GC, 26 October 2000), para 96, and *Kalashnikov v Russia*, App no 47095/99 (ECtHR, 15 July 2002), para 95). On the application of art 3 ECHR to prison conditions see J M Larralde, ‘L’article 3 CEDH et les personnes privées de liberté’, in C-A Chassin (ed) *La portée de l’article 3 de la Convention européenne des droits de l’homme* (Bruylant 2006) 209.

⁴⁷ As noted by some authors, it is highly unlikely that the Court would provide a remedy under art 3 for an applicant whose claim relates to an alleged risk of ‘degrading treatment’ in the receiving country, even if the assessment of such ill-treatment based on a sense of debasement and humiliation would plainly satisfy the minimum level of severity in non-expulsion contexts (see Y Arai-Yokoi, ‘Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR’ (2003) 21 *Netherlands Quarterly of Human Rights* 385, at 413, and Y Arai-Takahashi, ‘Uneven, But in the Direction of Enhanced Effectiveness – A Critical Analysis of “Anticipatory Ill-Treatment” under Article 3 ECHR’ (2002) 20 *Netherlands Quarterly of Human Rights* 2, 15-17).

⁴⁸ See *Selmouni v France*, App no 25803/94 (ECtHR, GC, 28 July 1998), para 101, where the Court stated that ‘the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’. In this respect see M K Addo, N Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’ (1998) 9 *EJIL* 510, 517.



c) *The 'disappearance' after deportation as a ground for dismissal*

A further weakness of the Court's case-law potentially inconsistent with the absolute nature of the protection against removal under Article 3 ECHR concerns the dismissal of cases where the applicant has disappeared after deportation or was not able to maintain contact with his or her representatives before the Court.

In general terms, if the deportation or extradition has already been executed at the time of the Court's examination of the complaint, the assessment of the risk is carried out keeping into account the information 'which comes to light subsequent to the expulsion' and which 'may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fear'.⁴⁹ For instance, the fact that the applicant did not suffer any ill-treatment in the receiving State could be assessed by the Court for the purpose of excluding *ex ante* the existence of the alleged risk;⁵⁰ on the contrary, the fact that the applicant was actually ill-treated after repatriation does not entail automatically a violation of Article 3 ECHR, as shown by the *Vilvarajah* case.⁵¹

In light of these principles, the Court has sometimes attached decisive weight to the lack of reliable information as to the applicant's actual treatment in the receiving country upon removal in order to exclude the alleged violation of Article 3 ECHR by the returning State. For instance, in the *Mamatkulov and Askarov* case, the majority of the judges of the Grand Chamber held that, lacking information about the applicants' conditions of detention following their extradition to Uzbekistan, there was not sufficient material before it in order to conclude that substantial grounds existed at the time of the extradition for believing that

⁴⁹ See *Cruz Varas* (n 8), para 76, and *Mamatkulov and Askarov* (n 9), para 69.

⁵⁰ In addition to the *Cruz Varas* case quoted in the previous footnote, see also ECtHR, *Y v Russia*, App no 20113/07 (ECtHR, 4 December 2008), paras 83-91, where the Court attached weight to the fact that 'after returning to China the first applicant had moved in with his son and there was no information that he had been subjected to treatment in breach of Article 3'.

⁵¹ See *Vilvarajah* (n 3), paras 109-116, where the Court found no violation of art 3 ECHR notwithstanding the fact that the applicants had been subjected to ill-treatment upon their return to Sri-Lanka.



the applicants faced a real risk of ill-treatment.⁵² The same approach was followed by the Court in the *Shamayev and others* case, where it ruled out the existence of a relevant risk of ill-treatment in light of the fact that it was not possible to establish the applicants' genuine conditions of detention following their extradition to Russia.⁵³

Even more problematically, the Court has sometimes come to the conclusion that the incapacity of the applicants to maintain contacts with their representatives before the Court or with the Court itself, following their removal in alleged breach of Article 3 ECHR, justified the discontinuance of the examination of the case for lack of *locus standi*.

Notably, in the *Hussun and others* case, the Court decided to strike the application out on the grounds that it was not possible to establish any contact with the applicants, that their representatives could not meaningfully continue the procedure before it, and that, in such circumstances, it was impossible 'd'approfondir la connaissance d'éléments factuels concernant la situation particulière de chaque requérant' and notably 'd'acquérir des renseignements concernant, d'une part, le lieu où, en Libye, ces requérants ont été renvoyé et, d'autre part, les conditions d'accueil de ceux-ci de la part des autorités libyennes'.⁵⁴

The same approach was implicitly confirmed in the *Hirsi and others* case, where the Court rejected the Government's objection based on *Hussun* noting that 'the applicants' lawyers have provided detailed information throughout the proceedings concerning the facts and the fate of the applicants with whom *they have been able to maintain contact*'.⁵⁵

⁵² See *Mamatkulov and Askarov* (n 9), paras 71-78. In their partially dissenting opinion, judges Bratza, Bonello and Hedigan have, instead, held that the absence of evidence about the applicants' treatment following their removal to Uzbekistan could not be considered a decisive factor for the purpose of assessing the risk of which the Turkish authorities should have been aware at the time of the extradition.

⁵³ See *Shamayev and others v Georgia and Russia*, App no 36378/02 (ECtHR, 12 April 2005), paras 340-353, and *Aoulmi v France*, App no 50278/99 (ECtHR, 17 January 2006), para 118.

⁵⁴ See *Hussun and others v Italy*, App nos 10171/05, 10601/05, 11593/05 and 17165/05 (ECtHR, 19 January 2010), paras 40-50. Similarly, see *Nehru v the Netherlands*, App no 52676/99 (ECtHR, 27 August 2002), where the Court held that, given the impossibility of establishing any communication with the applicant, his representative could not meaningfully pursue the proceedings before it, while recognising that 'an expulsion carried out speedily might frustrate an applicant's attempts to obtain the protection to which he or she is entitled under the Convention'.

⁵⁵ See *Hirsi Jamaa* (n 19), para 54 (emphasis added).



Furthermore, the Court's practice is to strike applications out of the list when an applicant dies subsequent to his or her removal in alleged breach of Article 3 ECHR and no heir or close relative wishes to pursue the case.⁵⁶

Even if in some other cases the Court appeared to be more open-minded in this respect,⁵⁷ such a formalistic approach is at odds with the absolute character of the protection (allegedly) afforded by Article 3 ECHR. Especially in the most problematic cases (such as those concerning mass expulsion to unsafe countries where migrants are subjected to systematic human rights violations), it could turn out to be extremely difficult (if not materially impossible) for the applicant to maintain contact with his or her representative before the Court and for the representative to provide the Court with reliable information as to the fate of the applicant in the receiving country. Likewise, it is often impossible to find a 'close relative' wishing to pursue the procedure before the Court in case of the death of the original applicant.

The adverse effects of the Court's practice described above are self-evident. The protection afforded by the ECHR in removal cases risks being weakest in those instances that would require more rigorous scrutiny and more severe reaction by the Court. For example, were the returning State to create a situation in which the persons concerned are prevented from keeping contact with their European representatives or, even worse, they die following their removal, such a State would avoid any form of responsibility under the ECHR.

In other words, even when the loss of contact or the death of the applicant is a direct consequence of the returning State's actions in potential breach of Article 3 ECHR, the Court would be either prevented from continuing the examination of the case under this head or it would not be able to properly establish the existence of the alleged risk of ill-treatment. This state of affairs does not seem to fit in line with the primary objective of the ECHR to protect rights that are 'practical and effective' and risks nullifying the Court's mission with respect to all those persons who cannot make (or can no longer make) their voice heard by the Court's Registry.

⁵⁶ *ibid* para 57.

⁵⁷ See, for instance, *Muminov v Russia*, App no 42502/06 (ECtHR, 11 December 2008), paras 91-98, where the Court found a breach of art 3 ECHR notwithstanding 'the absence of any reliable information as to the situation of the applicant after his expulsion to Uzbekistan'. Similarly, see also *Ben Khemais* (n 29), para 85.



d) *The absence of a 'right to a status' for 'non-removable aliens'*

A further factor that may contribute to undermining the effectiveness of the protection afforded by the ECHR against removal stems from the Court's reluctance to impose on States any specific obligation concerning the legal status afforded to the person that cannot be removed.

As a matter of fact, an alien will be entitled to claim a wide protection against removal under the ECHR, but the right not to be removed – if established – does not come along with the right to receive a particular treatment by the host State, the latter remaining free to decide how to regulate the legal status of a non-removable alien.⁵⁸

In this respect, the Court has repeatedly stated that the right to respect for private and family life (Article 8) cannot be construed as guaranteeing, as such, the right to a particular type of residence permit and that it is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone.⁵⁹ It follows that the individual whose life and limb would be exposed to a serious risk in case of deportation – but who is not eligible for refugee status under the Geneva Convention – could be left in a sort of 'legal limbo' in the hosting State and forced to live in conditions of moral and material destitution, without even being allowed to have access to employment in order to provide for his or her own sustenance or to benefit from alternative mechanisms of social assistance.

A tragic example of the adverse consequences of this approach is offered by the *Ahmed* case, where the Court held that the decision to deport the applicant (whose refugee status had in the meantime been withdrawn under the Geneva Convention following a criminal conviction) would be contrary to Article 3 ECHR.⁶⁰ While Mr Ahmed was allowed to remain on the Austrian territory due to the risk of ill-treatment in Somalia, he was nonetheless deprived of his refugee status and of all

⁵⁸ In this respect see Mole, Meredith, *Asylum* (n 13), 190 ff.

⁵⁹ See, for instance, *Said Botan v the Netherlands*, App no 1869/04 (ECtHR, 10 March 2009), para 22, *Ibrahim Mohamed v the Netherlands*, App no 1872/04 (ECtHR, 10 March 2009), para 21, and *Sisojeva and others v Latvia*, App no 60654/00 (ECtHR, 15 January 2007), para 91.

⁶⁰ See *Ahmed* (n 8), paras 41-47.



related social and economic benefits, a situation which led him to commit suicide after a couple of months.

4. *Appraisals*

The analysis of the Strasbourg Court's case-law relating to the protection against removal of aliens to unsafe countries shows that the general progressive tendency to broaden such a protection is often counterbalanced by a number of 'smoothing' factors, which mitigate to a large extent its practical implications in asylum and immigration matters.

It is our view that the indomitable judicial dynamism of the Court in expanding the guarantees afforded by Article 3 ECHR in this context should not be rhetorically and uncritically commended, given that the enhancement of the level of protection – although undeniable on paper – is at least to some extent destined to remain a simple proclamation of principle, with no effective capacity of being applied in practice.

Indeed, it is hard to deny that, behind the curtains of the stereotyped recognition of the absolute nature of the prohibition of removal to unsafe countries and of the need to construe such a prohibition so as to ensure a 'practical and effective' protection of fundamental rights, the Court's case-law in this field is still affected by a substantial degree of uncertainty, flexibility and inconsistency in the assessment and application of the relevant normative parameters and evidentiary standards, which often disguise forms of balancing between individual rights and governmental interests and which moreover risk undermining – at least *de facto* – the absolute character of the prohibition of torture and inhuman or degrading treatment.