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Fleeing violence and poverty : non-refoulement obligations under the European Convention of Human Rights

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Introduction *

The forcible expulsion of immigrants forms an increasingly important part of Western European immigration policies. Persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion are legally protected against *refoulement* by the 1951 Refugee Convention and its 1967 Protocol. However, contemporary forms of forced migration are often caused by other kinds of serious threats to people's basic human rights. In fact, the European Council on Refugees and Exiles believes that people who clearly fall into one of the Convention categories are the exception rather than the rule.[1]

The European Convention of Human Rights (ECHR), as well as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT) play an important complementary role in protecting non-Convention refugees from expulsion. In particular, Article 3 ECHR, which prohibits in absolute terms "torture or inhuman or degrading treatment or punishment", contains wide-ranging *non-refoulement* obligations towards those who can demonstrate that their right to a dignified existence would be very likely to be violated if they were returned to their country of origin.[2] In fact, Lambert's analysis finds that resort to the European Court is the "best option" for rejected asylum-seekers to appeal against their expulsion, compared to the Human Rights Committee or the Committee against Torture. The main reason for this is that "*non-refoulement* under the European Convention extends to inhuman and degrading treatment, whatever the source".[3]

Given that European states have legally committed themselves to observing the human rights treaties they ratified, their understanding of the negative and positive obligations resulting from this commitment ought to be continuously clarified and brought into line with recent developments in international human rights jurisprudence. By examining the case-law of the European Court of Human Rights ("the Court"), I will explore the scope of Article 3 protection with respect to country of origin conditions. In order to delineate the boundaries of such treatment as has been understood to violate human dignity, I will analyse both expulsion and 'domestic' cases considered under Article 3. I conclude that Article 3 might protect immigrants against expulsion to countries where their human dignity would be jeopardised, not only due to maltreatment in the context of persecution or generalised violence, but also due to conditions of severe poverty.

The first part of this paper outlines the problem which Article 3 protection is designed to address: the gap between the demand for refugee protection and the legal mechanisms currently available to afford such protection, including other provisions of the ECHR. The second part contains a detailed analysis of the scope of Article 3 as it emerges from the jurisprudence of the Court, and the positive obligations it imposes

* I wish to thank Magdalena Sepúlveda for her guidance, Liza Schuster, Jane McAdam and Andrew Shacknove for their comments and advice, and Greta Uehling for her editing suggestions.

[1] ECRE Position Paper on Complementary Protection (2004), www.ecre.org/positions/cp.shtml, p. 1.

[2] For simplicity's sake, I will refer to the 'country of origin' as the country of destination following forced removal, including third countries to which an expelled person may be sent.

[3] Helene Lambert, 'Protection against *Refoulement* from Europe: human rights law comes to the rescue', *International and Comparative Law Quarterly* (1999), p. 543.

on states parties to the Convention. First, I will establish the boundaries of the concepts of 'torture', 'inhuman', 'degrading' and 'treatment' as developed in the case-law. Then, the peculiarities of the applicability of Article 3 to cases of extraterritorial jurisdiction will be addressed. Finally, I will explore the extent to which Article 3 has been construed so as to protect persons from severe suffering due to adverse social and economic conditions. Could expulsions into country of origin conditions of extreme poverty be regarded as 'degrading' or even 'inhuman'?

The third part discusses the findings and implications of my analysis of the Court's case-law under Article 3. I will conclude that the extensive *non-refoulement* obligations imposed by Article 3 constitute an important complementary protection mechanism for people fleeing violence and extreme poverty. However, I will also demonstrate some limitations to such protection, notably the Court's strict application of the standard of proof and the 'real risk' criterion.

Part I – Who needs protection?

There are no voluntary refugees. — *Amnesty International*

The causes of migration

As noted by the UNHCR Executive Committee, "the underlying causes of large-scale involuntary population displacements are complex and interrelated and encompass gross violations of human rights, including in armed conflict, poverty and economic disruption, political conflicts, ethnic and inter-communal tensions and environmental degradation".[4] It is widely recognized that natural or man-made disasters such as famines, earthquakes or the adverse impact of large-scale development projects may uproot whole communities and force them to abandon their traditional habitat. Loescher emphasises additional socio-economic push and pull factors such as "widespread unemployment and poverty, growing disparities in income and economic opportunities both within and between countries".[5]

In the growing literature on approaches calling for a new regime to 'manage migration',[6] the complexity and interrelatedness of root causes of forced migration movements are diagnosed as a basic problem for the design of appropriate international protection mechanisms, since the originally envisaged[7] clear-cut distinction between 'refugees' and '(economic) migrants' is often absent, or difficult if not impossible to determine in practice. As the UNHCR Handbook notes, "[t]he distinction between an economic migrant and a refugee is, however, sometimes

[4] UNHCR Executive Committee 'Conclusion Specific to Comprehensive Approach' No. 80 (XLVII), (1996).
[5] Gil Loescher, 'Forced Migration in the Post-Cold War Era: The Need for a Comprehensive Approach', in Bhimal Ghosh (ed.), *Managing Migration – Time for a New International Regime?* (2000), p. 191.
[6] *See*, *e.g.* Ghosh, *ibid.*
[7] *See, e.g.,* Atle Grahl-Madsen, The Status of Refugees in International Law (1972).

blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear."[8]

The definition of refugeehood

It has been well-recognized in the literature that the Convention definition "fails to recognize the claims of persons whose predicaments do not resemble those of the post-Second World War ideological emigrés; […] it is insufficiently attentive to dilemmas that result from the failure of states, rather than from more active forms of persecution".[9] For example, the refugee definition in the 1951 Convention "almost completely exclud[es] the violation of economic and social rights from the concept of persecution".[10] According to Gallagher, originally "[t]hese restrictive definitional efforts were motivated, of course, to keep the numbers down".[11] Yet Shacknove criticises that still today, "states reason in reverse from their fear that they will be forced to shoulder the burden of assisting refugees unilaterally to a narrow conception of refugeehood which limits the number of claimants. In so doing, they are attempting to resolve what is in fact a procedural and institutional problem by a legalistic sleight of hand".[12] According to Hathaway, "no definition of refugee status can […] be ethical if it is not realistically susceptible of implementation".[13] However, legal and political responses to refugee situations can also not be said to be ethical unless they are based on an independent and realistic assessment of the situation they purport to remedy. It is crucial not to confuse the pragmatic difficulties involved in humanitarian responses with the standard applied to acknowledge refugeehood or the need for international protection. Instead, the identification of those in need of international protection is conceptually *prior* to the design of policy responses. In other words, it is important first to establish which persons are in need of international protection in order to then design appropriate protection policies, and not, as is too often the case, the other way around, according to which states' limited willingness to accept large group of refugees lead to an accordingly restricted definition of what constitutes a 'genuine' refugee.

For the purpose of this paper, I will distinguish 'basic needs refugees' as a sub-group of all migrants, covering those who, "if forced to return or to stay at home […] would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardize their physical security or vital subsistence needs".[14] Obviously, this group includes Convention refugees, but it also includes those "involuntary migrants who cannot link their fear to one of the five enumerated grounds of civil or

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[8] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), para. 64.

[9] James Hathaway, 'Is Refugee Status Really Elitist? An Answer to the Ethical Challenge', in: Jean-Yves Carlier and Dirk Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997), p. 79.

[10] Pieter van Dijk, 'Article 3 ECHR and Asylum Law and Policy in the Netherlands', in Richard Lawson (ed.), *The Dynamics of the Protection of HR in Europe* (1994), p. 150.

[11] Denis Gallagher, 'The Evolution of the International Refugee System', *International Migration Review*, vol. 23 no. 3 (1989), p. 581.

[12] Andrew Shacknove, 'Who is a Refugee?', *Ethics* 95 (1985), p. 277.

[13] Hathaway, p. 80.

[14] Matthew J. Gibney, 'Liberal Democratic States and Responsibilities to Refugees', *American Political Science Review*, vol. 93 no. 1 (1999), pp. 170-171.

political status".[15] In recognition of the fact that it is "the absence of state protection of the citizen's most basic needs [which] constitutes the full and complete negation of society and the basis of refugeehood",[16] I will refer to these basic needs refugees simply as 'refugees' and indicate where reference is made specifically to 'Convention refugees'.[17] By definition, then, UNHCR's aim for the international community to "provid[e] international protection to all who need it"[18] would thus include basic needs refugees. Should "the consequences become too burdensome for [a] host state, or disproportionate in comparison to other states' contributions, this problem can only be solved by programmes of bilateral and multilateral assistance and international coordination".[19]

Complementary protection

As stated above, human rights law plays a vital role by offering complementary protection to basic needs refugees. Other efforts to respond to the growing mismatch between the nature of forced migration and the available international protection under the 1951/1967 regime include a) an increasingly inclusive interpretation of the 1951 Convention refugee definition, and b) states' generous admittance of basic need refugees on 'compassionate' grounds.

First, with regard to the expansion of the Convention, a growing number of states have, for example, acknowledged women fleeing unremedied domestic violence as victims of gender-based persecution *qua* members of a particular 'social group'. Also, according to Goodwin-Gill, "less overt measures may suffice" to constitute persecution, "such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society".[20] Regional instruments like the OAU Convention[21] and the Cartagena Declaration[22] have added legal protection for persons fleeing, for example, 'generalised violence' and 'internal conflicts', or 'massive human rights violations' respectively. Yet possibilities to expand the protection range of the Convention are limited, since its definition inherently relies on the concept of 'persecution', which will always have to be linked to one of the five Convention grounds for refugee status, however broadly defined. There is thus a heavy emphasis on the necessity of establishing an element of intent and personal authorship of the harm suffered. With regard to the non-availability of resources to cover vital subsistence needs, insufficient state attention or negligence is not sufficient to claim refugee status, unless it can be shown that discriminatory

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[15] Hathaway, p. 79.
[16] Shacknove, p. 277.
[17] As an alternative definition to that contained in the 1951 Convention, Shacknove argues that "refugees are, in essence, persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible" (p. 277).
[18] UNHCR ExCom "Conclusion", *supra* note 4.
[19] Van Dijk, p. 153.
[20] Guy Goodwin-Gill, *The Refugee in International Law* (1996), pp. 38-39.
[21] Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45.
[22] Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984-85). The Declaration is not legally binding under international law but it has been incorporated into the national asylum legislations of various Latin American countries.

practices underlie the economic hardship of certain groups.[23] In theory, it could be argued that 'massive violations of human rights', as envisaged in the Cartagena Declaration, include severe violations of economic and social rights, and would thus recognise the victims of these violations as refugees in the relevant regional contexts. To this effect it must be demonstrated that such violations are indeed ascribable to a failure of states to prevent or remedy such violations. As Shacknove and others have convincingly argued, 'natural' disasters are indeed "frequently complicated by human actions"[24] and the resulting destitution is often to a greater extent attributable to state negligence or indifference than to the weather.[25] Thus, van Dijk suggests that "every threat of a violation of a human right […] may constitute a well-founded fear of being persecuted, depending on the reasons behind the threat […] and the seriousness of the physical, psychological or material consequences".[26]

Second, in the face of massive influx crises, such as for example during the Bosnian conflict, or due to major 'natural' disasters, or in individual 'hardship' cases, host states have increasingly responded by generously granting 'temporary protection' status on 'compassionate grounds'. There are, however, three major problems with this 'compassionate' approach. First, "while acknowledging that persons fleeing armed conflict or internal disturbances need international protection, some states have argued that this does not derive from any obligation, but is purely a matter of states' discretion".[27] A discretionary framework is intransparent and vague about the coverage of persons supposed to benefit from this form of complementary protection. It entails a disconcerting insecurity for the recipients of 'B' or 'humanitarian' status with regard to the duration of the protection, thus rendering refugees extremely vulnerable to ad hoc decisions of politicians and pressure of public opinion. Second, 'humanitarian status' beneficiaries are mostly granted less rights than Convention refugees. In some states, a stay of expulsion on humanitarian grounds is not complemented with any residence rights, the right to family reunion, or to obtain work permits. Immigrants are thus left in a legal limbo and vulnerable to economic exploitation, often with dramatic consequences.[28] Thirdly, and as a result of the combination of the first and the second problems, European host states have a strong incentive to interpret the 1951 Convention narrowly in order to grant more immigrants 'B status' rather than recognize them as Convention refugees, in order to avoid rendering them eligible for a wider array of social benefits. Indeed, as McAdam

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[23] For a discussion of 'economic persecution', see Karen Musalo et al., *Refugee Law and Policy: Cases and Materials* (1997), chapter on 'Economic Harms as Persecution', p. 235 *et seq*. In the *Gashi* case, a UK Court decided that a young man fleeing Kosovo should not be returned to Serbia, *inter alia* because the authorities would impede his employment opportunities and he would thus not be able to sustain himself. (*R.* v. *Secretary of State for Social Services* ex parte "B." and ex parte "JCWI", nos. CO/0384/96 and CO/0594/96, Judgment of 25 March 1996 before the Divisional Court UK).

[24] Shacknove, p. 279.

[25] "When starvation occurs not because of drought or flood but because of the hoarding of grain or the corrupt distribution of material aid, deprivation is no longer the result of natural conditions. [Rather,] the state has left unfulfilled its basic duty to protect the citizen from the actions of others." (Shacknove, p. 280)

[26] van Dijk, p. 127.

[27] Jane McAdam, 'The European Union proposal on subsidiary protection: an analysis and assessment', *UNHCR Working Paper* no. 74 (2002), p. 7.

[28] For example, Mr. Ahmed, who, following his successful case against Austria before the Court (*Ahmed* v. *Austria*, 17 December 1996, no. 25964/94), was not forcibly returned to Somalia but was neither granted residence or any related rights in Austria, ended up homeless and eventually committed suicide in the Human Rights Square of the town of Graz in 1998 (http://assembly.coe.int/Documents/WorkingDocs/ doc01/EDOC9307.htm).

observes, "a greater use of complementary and temporary protection mechanisms corresponds to increasingly restrictive interpretations in all EU states as to who meets the criteria" of the Refugee Convention definition in Article 1A(2).[29]

By contrast, complementary protection based on human rights law is non-discretionary. Its implicit or explicit prohibitions of *refoulement*[30] protects all persons *qua* human beings, without distinguishing between refugees, migrants, or according to any other legal status, including the legality of a person's presence on another state's territory. Due to its lack of a nexus requirement, i.e. a necessary link between the (anticipated) ill-treatment and a certain civil or political characteristic of the victim, the 'human rights approach' might also be regarded as a morally more legitimate approach than other forms of complementary protection: It is aimed at ensuring human beings a certain type of treatment, namely one that pays due regard to their dignity inherent in human nature, rather than insisting on a certain – and narrowly constructed – source of the harm, or the motive or objective with which it was inflicted. Obviously, the 'human rights approach' is limited to the provisions contained in the human rights treaties a host state is party to,[31] as well as these states' reservations to those treaties which commonly restrict the rights of non-citizens.

Human Rights, Expulsion and *Non-Refoulement*

The difficulty of the human rights-sovereignty conundrum is perhaps nowhere more apparent than in the situation of return. J. van Selm-Thorburn[32]

Immigration control has since ancient times been regarded as an essential element of states' sovereignty.[33] And "[i]mmigration control implies two capacities: to block the entry of individuals to a state, and to secure the return of those who have entered".[34] The sovereign right to exercise immigration control is being challenged and defended in the current academic debate about the morality of border controls. For example, Hayter argues that "borders between countries are hurtful, […] immigration controls are racist, encouraging restrictions of flows of persons from the Third to the First World breeds xenophobia, and controls upon free movement only hurt those persons who most require assistance".[35] Gibney and Hansen, on the other hand, suggest that

[29] McAdam, pp. 7-8.

[30] See *e.g.* Article 3 ECHR, Article 7 ICCPR, Articles 2 and 3 CAT, Article 37(a) of the Convention on the Rights of the Child, etc.

[31] In addition, it is argued that *non-refoulement* in torture cases has become a rule of *jus cogens.* For a discussion of the *jus cogens* nature of *non-refoulement,* see Jean Allain, 'The Jus Cogens Nature of Non-Refoulement', *International Journal of Refugee Law*, vol. 13 no. 4 (2002). However, given the absence of an international body supervising human rights *jus cogens*, enforcement of this rule is difficult where a state is not a party to the above mentioned treaties.

[32] Joanna van Selm-Thorburn, *Refugee Protection in Europe – Lessons of the Yugoslav Crisis* (1998), p. 54.

[33] For a historical overview of immigration control and asylum practices from ancient times, see Surya Prakash Sinha, *Asylum and International Law* (1971).

[34] Matthew J. Gibney and Randall Hansen, 'Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom', *UNHCR Working Paper* no. 77 (2003), p. 1.

[35] Robert Barsky, Book Review of Teresa Hayter, 'Open Borders: The Case Against Immigration Controls', in *Journal of Refugee Studies*, vol. 14 no. 2 (2001), p. 207.

some form of exclusion is necessary in order to preserve some of the cultural, political and economic benefits that result from a certain cohesion of communities.[36]

Legally, however, immigration controls remain unquestioned in principle. The Strasbourg judges have confirmed this on numerous occasions: "[U]nder general international law a state has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory".[37] It is, however, equally well-established that "a state [party to the ECHR] must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention".[38] Article 1 of the ECHR clearly obliges European states to "secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention" (emphasis added). A similar provision applies to all states parties to the ICCPR,[39] and the UN Human Rights Committee has expressly confirmed the non-discriminatory extension of this provision to immigrants.[40] In principle, then, human rights law makes no distinction between nationals and non-nationals,[41] unless provisions in these treaties explicitly provide for the lawfulness of such distinctions. Most major international human rights instruments contain provisions which limit the enjoyment of some rights to nationals of the contracting state, and which expressly allow for state interference with the freedoms of aliens. Article 16 ECHR, for example, authorises states parties to restrict the 'political activity' of aliens, which may include the rights to freedom of opinion, speech, and assembly.[42]

The principle of *non-refoulement*, by contrast, is applicable to every person within the jurisdiction of a state. By incurring states' responsibility for events outside its jurisdiction in certain circumstances, it significantly limits the idea that the expulsion of a person "severs permanently and completely the relationship of responsibility between the state and the individual under its authority".[43] This is because states must 'ensure' that individuals are 'effectively' not subjected to treatment prohibited by human rights law, whether inflicted on the territory of a state party to the treaty or outside of that state's jurisdiction. In other words, by extraditing or expelling an individual to another state, the act of expulsion or extradition is regarded as a link in the chain of events potentially leading up to ill-treatment. Thus, expulsion "is by no means a 'neutral act' which cannot give rise to direct responsibility of the extraditing state [...] A teleological interpretation of the [European] Convention could lead to no

[36] Gibney and Hansen, *supra* note 34.
[37] van Dijk, p. 133, quoting *X* v. *Sweden*, Decision of 6 July 1977, no. 6094/73.
[38] *Ibid.*
[39] Article 2(1) ICCPR.
[40] Human Rights Committee, General Comment no. 15, *The position of aliens under the Covenant* (Twenty-seventh session, 1986), U.N. Doc. HRI\GEN\1\Rev.1 at 18 (1994), para. 1.
[41] Article 14 ECHR provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured *without discrimination on any ground* such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (emphasis added). In *Koua Poirrez* v. *France,* 30 September 2003, no. 40892/98, the applicant successfully invoked Article 14 when France refused to grant him disability benefits on the grounds of his Algerian origin.
[42] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2000), p. 313. Similarly, Article 12 ICCPR grants the right to freedom of movement only to persons 'lawfully within the territory of a state'. Article 25 ICCPR restricts political participation rights to 'citizens'.
[43] Gibney and Hansen, p. 1.

other conclusion than that states remain responsible for foreseeable consequences of their acts outside their territories".[44]

The debate about the scope of implicit *non-refoulement* is ongoing.[45] It has not yet been unambiguously established exactly which human rights "contain ancillary prohibitions of *refoulement*, [or how we are] to identify the delimitations of such implicit prohibitions of *refoulement*".[46] For example, the question might arise whether an individual who, due to his or her presence on the territory of a state party to the ECHR, would be entitled to the protection of their right to freedom of religion, could lawfully be expelled if it was established that this right would be violated in the destination country. Would not the expelling state violate that individuals' right to freedom of religion by expelling him or her to a place where freedom of religion is not ensured? The Strasbourg Court has expressly denied that the mere fact that conditions in the country of origin would be 'less favourable' than those enjoyed by immigrants in the host country is relevant.[47] As the Court stated in *Soering*, "Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention".[48] Thus, immigrants may not, in an appeal against an expulsion order, rely on the fact that the general human rights situation in their country of origin offers them less protection than that afforded by the European system. Instead, human rights restrictions on expulsion have thus far been limited to violations of the 'fundamental human rights', a notion which is in itself vague and problematic both from a moral and a legalistic point of view.[49] So far, the Court has considered extradition cases mainly under ECHR Articles 2 (right to life), 3 (freedom from torture or inhuman or degrading treatment or punishment), 5 (right to liberty), 6 (right to fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy, which was mainly invoked where the availability of procedures to appeal against expulsion orders was considered unsatisfactory). In *Soering* v. *UK*, the Court suggested that a risk of a 'flagrant violation' of the right to fair trial in the country of destination might 'exceptionally' engage the responsibility of an expelling state, thereby establishing that the gravity of the violation must exceed a rather high threshold.[50]

In sum, although the exact boundaries of the applicability of the principle of implicit *non-refoulement* have not been delineated precisely and their legitimacy is under debate, the Court has already indicated that the principle does not automatically

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[44] Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', *International and Comparative Law Quarterly* vol. 39 (1990), p. 761.
[45] See, *e.g.*, Gregor Noll, 'Fixed definitions or framework legislation? The delimitation of subsidiary protection *ratione personae*', *UNHCR Working Paper* no. 55 (2002).
[46] Noll, p. 4.
[47] *Bensaid* v. *UK*, 6 February 2001, no. 44599/98, para. 38; *Arcila Henao* v. *The Netherlands*, 24 June 2003, no. 13669/03.
[48] *Soering* v. *UK*, 7 July 1989, no. 25803/94, para. 86.
[49] **"**The enjoyment of one human right often depends on the ability to freely exercise other human rights. For example […] the right to food or the right to the highest attainable standard of health depend to a large extent on the capacity of affected communities to organise themselves (freedom of association) and to call attention to inefficiency, corruption or discriminatory practices in the provision of services (freedom of expression)."[49] (Canadian Department for Foreign Affairs, www.dfait-maeci.gc.ca/foreign_policy/human-rights/hr2-rights-en.asp).
[50] *Soering*, para. 113.

extend to the Convention as a whole. The reasons for a tendency to regard implicit *non-refoulement* as only applying to violations of 'fundamental rights' must be found in the tension between human rights treaties and the sovereign right of states to control their territory. While human rights treaties are designed to limit the power of states to a significant extent, states' rights under international law (such as the right to border control) in turn limit human rights to some extent. In fact, what might be called the 'mutual restriction principle' often informs the interpretation of human rights treaties, in the attempt to strike a "fair balance […] between the general interests of the community and the interests of the individual".[51] While it cannot be disputed that the main responsibility for human rights violations in the country of origin lies, of course, with the state on whose territory the violation occurs, an expelling state also bears considerable responsibility, and any measure limiting the applicability of its human rights obligations to an immigrant on its territory must be properly justified so as not to undermine the legal guarantee of Article 1 in connection with the human rights specified in Section I ECHR.

"Fortress Europe" and expulsions

"*'Does the world know we're here?' asks Jonathan, 29. 'In Europe is there anyone who lives in bushes? Does the world know we go hungry? That we're here without shelter, in winter, in the rain and cold? That we're the object of hunts, of killings?' In Missnana, death is a light sleeper.*"

Paulo Moura on Africans hiding in Morocco, hoping to reach Europe[52]

Within the "developed" world, Western Europe is now the main refugee-receiving region. However, due to widespread uncertainty among policy-makers over the political and economic asylum capacities of European welfare states and growing public demands to control and curtail immigration, "Fortress Europe" has been making it increasingly difficult for outsiders to enter its territory, particularly for those coming from poorer regions. Partly as a response to the real and perceived "abuse" of the institution of asylum,[53] the main component of Europe's efforts to reduce massive immigration is the prevention of potentially 'undesirable' aliens from reaching the continent's borders in the first place. As Bhabha writes, "border control has been exported far beyond the physical confines of developed states, by readmission agreements with surrounding buffer states, by visa requirements, and by penalties on carriers transporting undocumented or inadequately documented travellers".[54] Unfortunately, these "[n]on-arrival practices are completely indiscriminate in terms of whom they prevent from gaining access to asylum: those with the most well-founded claims to protection are excluded along with those with the weakest".[55] However, the need or desire of immigrants to enter or to unlawfully continue to reside in Europe persists. According to Hayter, "immigration controls do not work. In spite of the ever-increasing paraphernalia of repressive measures, during the 1990s the numbers of asylum seekers have remained constant".[56] As a result, a growing proportion of all immigration occurs outside of legal regulation, which in turn reinforces both the

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[51] Clayton and Tomlinson, p. 309.

[52] Paulo Moura, http://www.lettre-ulysses-award.org/authors04/moura.html.

[53] Gibney and Hansen, p. 10.

[54] Jacqueline Bhabha, 'Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights', *Harvard Human Rights Journal*, vol. 15 (2002), p. 160.

[55] Gibney and Hansen, p. 10.

[56] Hayter, p. 152.

perception of loss of control on the part of host states and a situation of rightlessness or legal limbo for many immigrants.

The classical Refugee Status Determination as detailed in the UNHCR Handbook – i.e. one by which a refugee arrives directly at an asylum state's border, submits his or her asylum claim, which is then assessed under the benefit of the doubt by a competently trained border official who determines whether that individual is eligible for protection under the Convention regime – thus exists much less in that form in contemporary Europe. Hence, where prevention of arrival fails, European states have resorted to concentrated – ineffective, but increasingly ambitious – efforts to expel those who enter illegally or overstay their residence permit,[57] through a wide array of carrot and stick measures,[58] and ultimately, forced removal or deportation.

Expulsion of undesired immigrants, whether actually implemented or as mere political rhetoric to reassure worried electorates and to deter further potential immigrants, is thus a key element of European immigration policies.[59] In Germany, for example, approximately 30,000 persons were forcibly removed in 2003, compared to about 50,000 asylum applications received.[60] In order to avoid failure in the implementation of an expulsion order, for example due to immigrants going into hiding or lacking appropriate travel documents, it is now common practice in western Europe to detain immigrants with a view to expulsion, sometimes in abysmal conditions.[61] These

[57] For example, in March 2004, the Dutch government announced its plan to expel 26,000 asylum seekers, which, according to Human Rights Watch, would "put thousands in danger" and "violate international law" (http://hrw.org/english/docs/2004/02/12/nether7360.htm).

[58] As for the carrots, the European Council has decided to implement "Return Action Programmes" supposed to facilitate the re-integration of rejected asylum seekers into their country of origin. Specific programmes exist, for example, in Afghanistan and the Balkans. Threats of deportation and systematic destitution of immigrants without residence permits are among the stick measures. Although European states sometimes 'tolerate' a rejected asylum seeker due to his or her risk of being subjected to inhuman treatment upon return, such toleration (*Erduldung*) is in some European countries not accompanied by the granting of any residence or work permits, thus leaving the immigrant extremely vulnerable to exploitation and often without any means of legally making any income to sustain themselves.

[59] The "EU Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection" (Brussels, 31 March 2004), 2001/0207 (CNS) will, upon implementation into national legislations, most likely change national asylum legislations in important respects. The latest proposal, for example, includes non-state actor persecution as a ground for subsidiary protection, while only recommending gender-based persecution to be considered, not defined, as a valid ground (Article 12(1d)). In this paper, I will not take the EU Directive into account, firstly because it is only relevant for 25 of the 43 member states to the ECHR, and secondly because the protection which Article 3 ECHR affords exceeds that of the Directive. Article 19 of the Directive states that "member states shall respect the principle of *non-refoulement* in accordance with their international obligations."

[60] Liza Schuster, 'The Exclusion of Asylum Seekers in Europe', paper given at the London Birkbeck Conference *The Refugee Problem and the Problems of Refugees in the 20th and 21st centuries* (March 2004), p. 7 (unpublished draft with author).

[61] See, *e.g.*, *Dougoz* v. *Greece*, Decision 8 February 2000, no. 40907/98. Pending his expulsion to Syria, Mr. Dougoz was "held for several months at the Drapetsona Police Station [in Athens], where, he alleged, he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise." (Council of Europe Press Release, http://www.echr.coe.int/Eng/informationnotes/INFONOTENo15.htm). The Court found that Greece had breached its obligation to protect him from ill-treatment as prohibited under Article 3 ECHR. In substantiating its judgment, the Court relied, *inter alia*, on the 1994 report by the European Committee for the Prevention of Torture, which observed similarly appalling conditions in other immigrants' detention centres.

practices, aggravated by a number of incidents in which unsuccessful asylum seekers lost their lives during the process of deportation, have evoked an intense debate over the legality and legitimacy of expulsion, a main aspect of which is the compatibility of these practices with human rights. Which ECHR provisions, then, are the most relevant ones to the expulsion debate? Before turning to the detailed analysis of Article 3 as concerning country of origin conditions, the following gives a brief overview over other ECHR provisions relevant to the legality of expulsion.

Other human rights provisions concerning expulsion and deportation

The 'collective expulsion of aliens' is prohibited in absolute terms by Article 4 of the fourth Protocol to the ECHR. Thus, every immigrant has the right to have their claim to asylum or *non-refoulement* assessed on an individual basis.

The Court has dealt with a number of cases in which applicants alleged that expulsions violated their right to respect for their private and family life. In some cases, a violation under Article 8 was found, for example because the expulsion separated spouses or other close family members.[62] Interestingly, the UN Human Rights Committee considered in an early case that "not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represent[ed] an interference by the authorities of the state party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius".[63] The Committee recommended that Mauritius "adjust the provisions of the […] Deportation (Amendment) Act, 1977, in order to implement its obligations under the Covenant".[64] However, it is important to note that, unlike Article 3, the right to non-interference under Article 8 is not absolute. Interference with this right by state authorities may be legitimate, for example, 'in the interests of national security, public safety or the economic well-being of the country', all of which are frequently invoked in connection with immigrants.

Concerning the process of deportation, i.e. the forcible removal of an alien who refuses to leave a host state voluntarily, issues have been raised under Article 3 (inhuman treatment),[65] Article 5 (right to liberty),[66] and Article 13 (right to an

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[62] *E.g. Moustaquim* v. *Belgium*, 18 February 1991, no. 12313/86: The applicant had been expelled from Belgium despite having lived there with his entire family since he was two years old. Following a number of criminal offences, he was expelled and abroad contracted a depression due to the disruption of his family ties. Five years later, he was re-admitted to Belgium due to a royal order giving him an 'opportunity for rehabilitation'. The Court found a violation of Article 8 despite Belgium's 'goodwill gesture' to allow Mr. Moustaquim's return, and awarded him BEF 100,000 for non-pecuniary damages.
[63] *Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius,* Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), para. 9.2(b)2(i)3.
[64] *Ibid.*, para. 11.
[65] *Ibid.*
[66] Article 5 provides that "[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […] (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." National tribunals have struggled with the notion 'with a view to'. In national legislations, time limits have been envisaged, e.g. six months in Germany, after which it has been found that, where deportation is suspended or uncertain due to legal

effective remedy).[67] Schuster rightly questions whether it is at all "possible to deport humanely if someone does not want to go".[68] The Court's case-law seems to indicate that the process of expulsion or deportation cannot, if properly conducted, in itself be regarded as violating Article 3. As the Court has noted on various occasions, "the suffering or humiliation involved must [for the finding of a violation of Article 3] go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment".[69] Thus, when expulsion or deportation of an individual is considered legitimate, the Court would hold the view that a certain 'inevitable' amount of suffering connected with the implementation of an expulsion order does not necessarily raise an issue under Article 3. In various domestic courts, cases are under way concerning alleged violations of treatment incompatible with Article 3 due to the use of unnecessary or disproportionate force on the part of deportation officials.[70] "When someone is deprived of his [*sic*] liberty, the Court has held that recourse to any physical conduct, not made strictly necessary by the victim's own conduct, diminishes human dignity and is in principle an infringement of the right set forth in Article 3".[71] Similarly, Article 2 (right to life) may come under the consideration of the Court should national courts fail to investigate properly[72] or decide unsatisfactorily in cases where rejected asylum seekers have died at the hands of state agents during the deportation process.[73] In this context, it is important to note that the right to life clearly implies the positive obligation for states to plan and control law enforcement operations "so as to minimise, to the greatest extent possible, recourse to lethal force".[74]

According to van Dijk and van Hoof, "[e]xpulsion and extradition may infringe Article 3 because of their direct physical or mental effects".[75] So far, the Strasbourg organs have used a rather high threshold when applying Article 3 to the process of deportation:

> "The Commission held that extradition within a day after a second attempt to commit suicide did not violate Article 3.[76] In the *Cruz Varas* case the Court did not consider that the applicant's expulsion to Chile

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or practical constraints, detention is not justified anymore under Article 5(f), thus becoming arbitrary and hence unlawful.

[67] The right to effective remedy has been alleged and found to have been violated where immigrants were not provided with the opportunity to appeal against an expulsion order in a national court. The seventh Protocol to the ECHR adds certain procedural safeguards specific to expulsions of aliens.

[68] Schuster, p. 5.

[69] *E.g. Labita* v. *Italy*, 6 April 2000, no. 26772/95, para. 120.

[70] See, *e.g.*, the Ageeb trial, *infra* note 71. For the Court's discussion of what constitutes 'disproportionate use of force', see, *e.g.*, *R.L. and M.-J.D.* v. *France,* 19 May 2004, no. 44568/98.

[71] Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons* (2002), p. 375, quoting *Ribitsch* v. *Austria*, para 38.

[72] *cf. Anguelova* v. *Bulgaria*, 13 June 2002, Application no. 38361/97, para. 136: In order to comply with a state's obligations imposed by Article 2, an investigation must be "thorough, impartial and careful".

[73] In the Amir Ageeb trial, a rejected Sudanese asylum seeker was suffocated by the German border police who pressed his head down for 20 minutes in his seat of the Lufthansa machine that would return him to Sudan. It took the German courts more than five years to establish the extent of the guilt of the policemen. For a detailed documentation, see http://lola.d-a-s-h.org/~rp/ageeb/index.php.

[74] *McCann and Others* v. *UK*, 27 September 1995, no. 18984/91, para. 194.

[75] Pieter van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention of Human Rights* (2003), p. 323.

[76] van Dijk and van Hoof, quoting *Raidl* v. *Austria,* Decision 4 September 1995, no. 25342/94.

> exceeded the threshold set by Article 3, although he suffered from a post-traumatic stress disorder prior to his expulsion and his mental health deteriorated following his return to Chile. And in *Nsona* v. *The Netherlands* the return of a nine-year-old child to Zaire that took seven days, part of which was unaccompanied, was not regarded as inhuman or degrading treatment."[77]

<u>Part II - Scope and content of Article 3 ECHR</u>

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 ECHR

The distinction between torture and inhuman or degrading treatment

The Court has confined its characterization of ill-treatment as 'torture' to cases where the treatment complained of could properly be described as "deliberate inhuman treatment causing very serious and cruel suffering".[78] From its case-law it is clear that the Court distinguishes between 'torture' and 'inhuman or degrading treatment or punishment' on the basis of both intent and severity. With regard to the element of intent, the Court emphasised in *Aksoy* v. *Turkey* that the ill-treatment under scrutiny "could only have been deliberately inflicted", since it had required "a certain amount of preparation".[79] In addition, it was believed by the Court "to have been administered with the aim of obtaining admissions or information".[80] Concerning the level of severity of the treatment at issue, the Court noted the "severe pain" and the permanent damage caused to the health of the applicant.[81] Another factor considered by the Court in distinguishing between torture and other forms of ill-treatment has been the long-term impact on the victim's well-being: In *Denizci* v. *Cyprus*, beatings of prisoners were not classified as torture since "no evidence was adduced to show that the ill-treatment in question had any long-term consequences for them".[82]

Often, cases in which a violation of Article 3 due to 'inhuman or degrading treatment' rather than torture was established have similarly involved a clear element of intent. For example, in the *Greek* Case, 'inhuman treatment' has been defined by the Commission as covering "such treatment as *deliberately* causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable".[83] Similarly, in *Raninen* v. *Finland*, the Court, "in considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, [would] have regard to whether its *object* is to humiliate and debase the person concerned".[84]

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[77] *ibid.*
[78] *Aksoy* v. *Turkey,* 18 December 1996, Application no. 21987/93, para. 63.
[79] *ibid.*
[80] *ibid.*
[81] *ibid.*
[82] *Denizci and Others* v. *Cyprus*, 23 May 2001, nos. 25316-25321/94 and 27207/95 385, para. 385.
[83] *Greek Case*, Report of 5 November 1969, Yearbook XII (1969), p. 186, as quoted in van Dijk and van Hoof, p. 309 (emphasis added). See also Article 1 UN Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Resolution 3452 (XXX) of 9 December 1975: "Torture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment."
[84] *Raninen* v. *Finland,* 16 December 1997, no. 152/1996/771/972*,* para. 55 (emphasis added).

With time, the Court's case-law evolved away from stipulating the necessity of finding an element of intent in the treatment classified as 'inhuman or degrading'. It has now established that a state may be held responsible for a violation of Article 3 even in the absence of any *deliberate* treatment by the authorities. In *Kalashnikov* v. *Russia,* the mere fact that an applicant was subjected to appalling conditions of detention, "in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment".[85] In *Peers* v. *Greece*, the Court confirmed that even where "no evidence that there was a positive intention of humiliating or debasing the applicant" could be found, "the Court note[d] that […] the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3".[86] The question whether the purpose of the treatment was to humiliate or debase the victim was "a factor to be taken into account",[87] but not essential for the final judgment.

The distinction between inhuman treatment and degrading treatment

The Court has often not found it necessary to specify whether, if a violation of Article 3 was considered, the treatment in question was regarded as 'inhuman' or as 'degrading'. In fact, in many cases the Court simply found "treatment prohibited by […] Article 3"[88] or "beyond the threshold set by Article 3".[89] From the case-law it seems to emerge that "[t]he difference between *inhuman* treatment or punishment and *degrading* treatment or punishment is […] one of gradation in the suffering inflicted",[90] since the Court has been of the opinion that "all torture must be inhuman and degrading treatment, and inhuman treatment also degrading".[91] Crucial for the establishment of all forms of ill-treatment is that such treatment "must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects".[92]

"[I]nhuman treatment has been held to include physical assault, force disproportionate to the amount needed to effect an arrest; [certain] psychological interrogation techniques;[93] dangerous, unsanitary, and unhealthy conditions of detention imposed by the state, where inmates are deprived of food, water, adequate personal space, and recreation; and failure to provide adequate medical treatment to persons in detention".[94] Also, "[a] disproportionately severe sentence of imprisonment could constitute 'inhuman punishment'.[95] If there is a risk that criminal proceedings abroad

[85] *E.g., Kalashnikov* v. *Russia,* 15 July 2002, no. 47095/99, paras. 102-103.
[86] *Peers* v. *Greece,* 19 April 2001, no. 28524/95, para. 74.
[87] *Ibid.*
[88] *Chahal* v. *UK*, 15 November 1996, no. 22414/93, para. 86.
[89] *Soering*, para. 111.
[90] van Dijk and van Hoof, p. 310.
[91] *Greek* Case, as quoted in van Dijk and van Hoof, p. 309.
[92] *Mamatkulov and Abdurasulovic* v. *Turkey,* 6 February 2003, nos. 46827/99 and 46951/99, para. 69.
[93] Impermissible interrogation techniques include, for example, deprivation of sleep, food, and drink, subjection to loud noise, and hooding. See, *e.g., Ireland* v. *UK*, 18 January 1978, Series A 25, para. 96.
[94] Fitzpatrick, p. 375.
[95] Clayton and Tomlinson, p. 393, referring to *Weeks* v. *UK,* para. 47, and *Hussain* v. *UK*, para. 53.

could lead to 'an unjustified or disproportionate sentence', a deportation may be a breach of Article 3".[96]

Degrading treatment has been found to apply to such treatment as "grossly humiliates [a person] before others or drives him [*sic*] to act against his will or conscience".[97] The acts complained of must "arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing [the victim] and possibly breaking his physical and moral resistance".[98] The case of *Tyrer* v. *UK*, for example, illustrates the difference in the application of the two notions. The Court did not consider that the corporal punishment (three strokes of the birch on his bare posterior) imposed on a 15-year-old for having assaulted a fellow-student amounted to 'inhuman punishment' within the meaning of Article 3.[99] However, it did judge that this form of punishment, meted out in a police station in front of complete strangers, combined with the 'mental anguish' of anticipation of the punishment for several weeks, had been degrading and thus violated Article 3. This was because, "although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity".[100]

The level of degrading treatment must be one surmounting that amount of suffering or humiliation which might come along with "the mere fact of being criminally convicted",[101] it must "go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment".[102] For example, in *Le Compte* v. *Belgium*, the withdrawal of Dr. Le Compte's permit to practice medicine for 'misconduct' was not regarded as degrading since it neither aimed at "the debasement of his personality; nor, as far as its consequences are concerned, did it adversely affect his personality in a manner incompatible with Article 3".[103]

Also, "[i]n considering whether a particular form of treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned".[104] Thus, in *Abdulaziz* it was held that the UK had unlawfully discriminated against the applicants on the grounds of sex by applying more restrictive rules for family reunion to women than to men. However, the Court found that the UK had done so simply in pursuit of legitimate aims such as advancing 'public tranquillity' and protecting the labour market at a time of high unemployment, and not out of "contempt or lack of respect for the personality of the applicants. [It] was not designed to, and did not, humiliate or debase them, [and] cannot therefore be regarded as 'degrading'".[105] In *Kuznetsov,* on the other hand, the Court maintained that the objective with which such treatment was inflicted is a factor

[96] *Ibid.*, referring to Altun v. Germany.
[97] *Greek Case*, as quoted in van Dijk and van Hoof, p. 309.
[98] *Peers*, para. 75.
[99] *Tyrer* v. *UK*, 25 April 1978, no. 5856/72.
[100] *Tyrer*, para. 33.
[101] *Tyrer*, para. 29.
[102] *Soering*, para. 100.
[103] *Albert and Le Compte* v. *Belgium*, 10 February 1983, nos. 7299/75 and 7496/76, para. 22.
[104] *Kalashnikov*, para. 95.
[105] *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*, 28 May 1985, nos. 9214/80; 9473/81; 9474/81, para. 91.

to be taken into account, but that "[e]ven the absence of such a purpose cannot conclusively rule out a finding of a violation of this provision".[106]

The absence of intent as a necessary element of treatment prohibited under Article 3 is important in connection with the implicit *non-refoulement* of that Article. Expelling or extraditing states may be guilty of subjecting a person to inhuman treatment even though the expulsion or extradition is not intended by the authorities to harm the expelled person in any way and is carried out in a legitimate exercise of states' rights to control their borders and 'national security'.

Having established that an element of intent is not necessarily relevant, while considering it as "a factor to be taken into account" for the finding of a violation of Article 3, the Court has nevertheless often examined the behaviour of the state authorities in the light of the conditions complained of. For instance, in *Peers* v. *Greece*, the Court observed that "the competent authorities took no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant".[107] However, in *Kalashnikov*, the Court found that the state's responsibility was even incurred when the authorities were "doing their best to improve conditions of detention", for example, by taking "all available measures to provide medical treatment".[108]

Positive obligations entailed by Article 3

Thus, rather than merely containing the negative obligation of refraining from a deliberate infliction of severe harm, Article 3 implicitly also imposes a wide array of positive obligations. In particular, the state must "protect the physical well-being of persons deprived of their liberty. The state must ensure that a person is detained in conditions which are compatible with respect for his human dignity".[109] Furthermore, the cases considered show that these positive obligations are obligations of result, not just obligations of conduct. It must be stressed, therefore, that, for the treatment of a person to be defined as 'inhuman or degrading', it is the "effect on the person undergoing the treatment which [is] decisive",[110] rather than the intention of the authorities which led to the treatment in question.

Moreover, these positive obligations apply, in fact, irrespective of a state's socio-economic situation. This is clearly expressed in *Kalashnikov*, where the Court acknowledged Russia's difficult financial situation and noted that "*for economic reasons*, conditions of detention in Russia were very unsatisfactory".[111] But given that "Article 3 of the Convention enshrines one of the most fundamental values of democratic society",[112] the Court found that financial constraints in an overall context of dire economic conditions do not relieve a state from its responsibility.

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[106] *Kuznetsov* v. *Ukraine*, 29 April 2003, no. 39042/97, para. 111.
[107] *ibid*.
[108] *Ibid.*, paras. 93-94.
[109] *Ahmet Özkan and Others* v. *Turkey*, 6 April 2004, Application no. 21689/93, para. 337.
[110] van Dijk, p. 316.
[111] *Kalashnikov*, para. 94 (emphasis added).
[112] *Ibid.*

Nor has the Court, in 'domestic' cases, found it relevant that the inhuman treatment suffered by an individual complainant was the rule rather than the exception. The Russian government objected in *Kalashnikov* that the treatment of the applicant could not be regarded as inhuman, since the appalling prison conditions he was subjected to "did not differ from, or at least were no worse than those of most detainees in Russia. Overcrowding was a problem in pre-trial detention facilities in general".[113] The significance of the Court's dismissal of this argument lies in the fact that human suffering could not be regarded as falling outside the state's responsibility, simply because such suffering had come to be regarded as 'normal' in any given cultural, historic or economic context.

In effect, the Court has established states' obligations to ensure that persons in their jurisdiction, and in particular when in the custody of the state, are treated in conformity with the object and purpose of the Convention, i.e. the protection of human dignity.[114] Moreover, states must take adequate measures to prevent such treatment being inflicted by private actors, such as mental institutions.[115] Self-inflicted inhuman treatment is, of course, exempt from state responsibility.[116] How far-reaching, then, is the responsibility of states with regard to treatment abroad?

The 'real risk' criterion

A key factor in determining the extent of *non-refoulement* under Article 3 is the existence of a 'real risk' of ill-treatment. Against the initial objection of the UK government that "the application of Article 3 […] should be limited to those occasions in which the treatment or punishment abroad is certain, imminent or serious",[117] the Court has by now firmly established that, instead, "[t]he test is whether it has been shown that there are *substantial grounds* for believing that the person concerned, if extradited, would face a *real risk* of being subjected to torture or inhuman or degrading treatment in the requesting country".[118] The Court's reasoning behind such lowering of the standard of proof from certainty to risk is twofold. First, the "serious

[113] *Kalashnikov*, para. 93. Given that "somewhere near a million persons are in prison in Russia [and that] most of them live under very difficult circumstances" (R.A. Lawson and H.G. Schermers, *Leading Cases of the European Court of Human Rights* (1999)), it is obvious that the Court can only deal with the tip of the iceberg. Mr. Kalashnikov, a former bank director charged with embezzlement, received EUR 5,000 in compensation for the suffering he experienced, but one may wonder about the fate of the 23 inmates with whom he had shared a cell measuring 17 square meters and containing only 8 beds.

[114] According to the Inter-American Court of Human Rights, the object and purpose of modern human right treaties 'is the protection of the basic rights of individual human beings, *irrespective of their nationality*, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligation, not in relation to other states, but towards all individuals within their jurisdiction.' Advisory Opinion on the Effect of Reservations, para. 17, quoted in Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law* vol. 14 no. 3 (2003), p. 532 (emphasis added).

[115] *E.g. Herczegfalvy* v. *Austria*, 24 September 1992, No. 10533/83.

[116] "In *McFeeley v. UK,* inmates at a prison went on a 'dirty protest' campaign, defiling their cells with waste food, urine and faeces, and refusing to wear prison uniforms. The Commission said that the resulting cell conditions would have been inhuman if caused by the state, but found that the state is not responsible for 'self-imposed conditions of detention'." (Clayton and Tomlinson, p. 399).

[117] *Soering*, para. 83.

[118] *Abdurrahim Incedursun* v. *The Netherlands,* Decision of 22 June 1999, no. 33124/96, para. 27 (emphasis added).

and irreparable nature of the alleged suffering risked" calls for preventive measures that should be broadly construed "in order to ensure the effectiveness of the safeguard provided by that Article".[119] Second, the Court has regularly stressed the absolute nature of the prohibition of treatment contrary to Article 3: "Even in the most difficult of circumstances, such as the fight against terrorism or organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. No provision is made, as in other substantive clauses of the Convention and its Protocols, for exceptions and no derogation from it is possible under Article 15".[120] Thus, an expulsion despite substantial grounds for believing that the person might subsequently be tortured or subjected to inhuman treatment would "plainly be contrary to the spirit and intendment of the Article".[121]

While certainty is not required, the Court has on the other hand held that "[a] mere possibility of ill-treatment […] is not in itself sufficient to give rise to a breach of Article 3".[122] Generalised violence, statistics of incidences of ill-treatment, or authoritative reports pointing to the vulnerability of certain groups of which the applicant might be a member, have been regarded as insufficient to engage Article 3 responsibility.[123]

As the Court established in *Cruz Varas*, the 'real risk' criterion needs to be assessed at the time of the final Court proceedings,[124] and it is the probability of ill-treatment at that moment which invokes the responsibility of the expelling state, not the actual occurrence of an Article 3 violation before the individual's flight or after his or her expulsion. In cases where immigrants had been the victim of torture prior to their flight, but where conditions in the country of origin have improved sufficiently, according to all available knowledge at the time, the person may, *mutatis mutandis*, be lawfully expelled. By analogy, if contrary to all available information at the time, it was plausibly established that there was no real risk, and the person does indeed become subjected to ill-treatment upon return, the expelling state will not be held responsible. For example, in *Vilvarajah* v. *UK*, a group of Tamil asylum seekers were returned to Sri Lanka and subsequently tortured.[125] According to the heavily criticised[126] judgment of the Court, however, the UK had not violated Article 3 because, at the time of the decision to expel, the government had not had 'substantial grounds' for believing that there was a 'real risk'. These events, which are, sadly, not unique,[127] clearly show that an "examination of a risk of ill-treatment in breach of Article 3 must be a rigorous one in view of the absolute character of this

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[119] *Soering*, para. 88.
[120] *E.g. Dulas* v. *Turkey,* 30 January 2001, no. 25801/94, para. 52; *Denizci*, para. 383; *Ahmet Özkan*, para. 334, *et al.*
[121] *Soering*, para. 88.
[122] *Vilvarajah and Others* v. *UK,* 30 October 1991, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 111.
[123] See *H.L.R.*, para. 41 for a case concerning generalised violence and risk of assassination in Colombia, or *Vilvarajah* and *Venkadajalasarma* v. *The Netherlands*, 17 February 2004, no. 58510/00, for cases concerning the applicants' membership in persecuted minority groups.
[124] *Cruz Varas and Others* v. *Sweden*, 20 March 1991, no. 15576/89, para. 76.
[125] Fitzpatrick, pp. 378-9.
[126] See, *e.g.*, van Dijk, pp. 145-146.
[127] Schuster provides further examples where asylum seekers from Kurdistan were not granted asylum on the grounds of the availability of an 'internal flight alternative'; upon return to Turkey they were indeed tortured and, when they next managed to immigrate in Germany, granted humanitarian (but not refugee) status due to improved documentary evidence.

provision".[128] However, in *Venkadajalasarma* v. *The Netherlands*, a recent and very similar case concerning the expulsion of a Tamil to Sri Lanka who had previously been tortured, the Court concluded that "no substantial grounds have been established for believing that the applicant, if expelled, would be exposed to a real risk" of ill-treatment.[129] Developments in the peace process looked promising and the country's human rights record appeared to be stabilising. Besides, the applicant had only played a minor role in the armed opposition groups, so that it was believed that the authorities would no longer have a particular interest in him.

In *Ould Barar*, a Mauritanian citizen claimed that he fled to Sweden to escape slavery. [130] His father was a slave and he himself might, if expelled to Mauritania, be severely punished by his father's master for having failed to comply with his duty to report to him in regular intervals. The Court recognised that, "[a]lthough slavery is officially prohibited by law in Mauritania, it has been reported by various international organisations that this practice still exists and that the government has not taken the necessary steps against it." Although "expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under [Article 3]",[131] the Court was not convinced that the applicant's freedom and integrity was at a sufficient risk, since he had previously been able to live an independent life in Mauritania's capital city and had not received any threats from his master since his departure.

In various cases, it seems that the threshold for establishing a 'real risk' has been set too high by the Court. As van Dijk writes, "[t]he borderline between a real risk and a potential risk is not a very clear one and should not be drawn in a way which undermines the effectiveness of the protection aimed at by Article 3. In view of the serious consequences which a violation of Article 3 will produce, giving the applicant the benefit of the doubt seems urgently required".[132] It is therefore surprising that in *Venkadajalasarma*, the Court did not even make reference to its decision in *Vilvarajah*, in which an underestimation by the UK government of the risk of ill-treatment awaiting returned Tamils in Sri Lanka had led to some of the applicants being tortured upon return. Although at the time of *Venkadajalasarma*, the political context in Sri Lanka had indeed become more stable, NGO reports available to the Court indicated that the danger of ill-treatment persisted for the applicant. In his dissenting opinion, Judge Mularoni found that the risk was sufficient to render the expulsion illegal, and voiced concern over the Court's strict application of the principle that "it is the present conditions which are decisive" for the risk-assessment. In Mularoni's view, this principle seems "tantamount to rendering compatible with the Convention any national decision of expulsion, even to a country where the risk for the applicant of being subjected to inhuman or degrading treatment is extremely high, provided that the respondent state waits for the 'right moment' to expel".[133]

[128] van Dijk and van Hoof, p. 330.
[129] *Venkadajalasarma*, paras. 68-69.
[130] *Ould Barar* v. *Sweden,* Decision of 16 January 1999, no. 42367/98.
[131] *Ibid.*
[132] van Dijk, p. 145.
[133] *Venkadajalasarma*, dissenting opinion, Judge Mularoni.

The burden of proof

In *H.L.R.* v. *France*, the Court decided that the expulsion of a former drug smuggler to Colombia was permitted, despite the fact that the applicant’s family in Colombia were receiving anonymous death threats against him. The applicant had revealed to the French police the identity of a key figure of the Colombian cocaine mafia who was subsequently detained but eventually released, and the Court did acknowledge that the French state “had a duty to protect [the applicant]”.[134] The Court was also aware that in Colombia, “drug traffickers sometimes take revenge on informers”, yet it concluded that “there is no relevant evidence. [The applicant’s] aunt’s letters cannot by themselves suffice to show that the threat is real”.[135] Hence, there were “no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians”.[136]

The Court further asserted that “it must be shown that […] the authorities of the receiving state are not able to obviate the risk by providing appropriate protection”.137 Although the fact that Colombia has one of the world’s highest records of homicide and that 90 per cent of all murders go unpunished138 was brought to the Court’s attention, it found that “[t]he applicant has not shown that [the authorities] are incapable of affording him appropriate protection”.139

This decision has been heavily criticised by four dissenting judges as “impos[ing] an unrealistic burden” on the applicant. Although these judges agree that the real evidence in this case was “quite meagre”, they insist that “that is only to be expected: killers seldom give advance warning before striking”.[140] As Judge Jambrek writes, such risk is more predictable when state authorities are involved, but the danger to the integrity of a person is not therefore any less real or serious.[141]

Article 3 and social and economic conditions

A decent standard of living, adequate nutrition, health care and other social and economic achievements are not just development goals. They are human rights inherent in human freedom and dignity. Human Development Report, UNDP (2000)

As discussed in Part I, basic needs refugees include not only persons whose physical security is jeopardised as a result of generalised or targeted violence, but also persons who flee situations where their basic subsistence needs can no longer be met due to natural or man-made disasters or a combination of both. Which resources are strictly necessary for a person to survive may vary slightly depending on geographical or personal circumstances. Arguably, means to ensure ‘vital subsistence’ include at least

[134] *H.L.R.*, para. 30.
[135] *ibid.*, para. 42.
[136] *Ibid.*
[137] *H.L.R.*, para. 30.
[138] Dissenting opinion, Judge Pekkanen.
[139] *H.L.R.*, para. 43.
[140] Dissenting opinion, Judge Pekkanen.
[141] Dissenting opinion, Judge Jambrek.

"unpolluted air and water, adequate food, clothing, and shelter, and minimal preventative health care".[142]

It must be pointed out here that the positive obligations to ensure mere 'survival' have been considered by the UN Human Right Committee as falling under the right to life which is protected by Article 2 ECHR.[143] The positive obligations imposed on a state by Article 3 must go beyond these, given that Article 3 is designed to ensure the protection not just of mere survival, but of a life in dignity, as far as the state's responsibility is concerned. As Cassese argues, "the scope of Article 3 is very broad; nothing could warrant its possible limitation to only physical or psychological mistreatment in the area of civil rights".[144] Indeed, the European Commission on Human Rights

> "did not rule out the possibility of applying Article 3 to a case where social and economic conditions rather than alleged misbehaviour of public authorities impinging upon the area of civil rights were at stake. In other words, the Committee did not dismiss out of hand the contention that Article 3 also bans any social and economic treatment of persons that is so humiliating as to amount to inhuman treatment".[145]

This view has been confirmed in various cases dealing with prison conditions, where state authorities clearly have a direct responsibility to provide "conditions which are compatible with respect for […] human dignity".[146] In an assessment of whether conditions of detention are compatible with Article 3, "account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant".[147] Although social and economic conditions under Article 3 have mainly been considered in 'domestic' cases, the principle of extraterritorial jurisdiction may also apply. What follows is an analysis of the few cases which have been considered as of now regarding basic needs such as health care, nutrition and shelter

Health

In the extraordinary case of *D.* v. *UK*, the Court unanimously held that the British government would violate Article 3 if it forcibly returned an AIDS patient in the terminal stages of his illness to his home island of St Kitts and Nevis, where no adequate medication would be available to him. The Court judged that "his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment".[148] In arriving at this judgment, the Court

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[142] Shacknove, p. 281.
[143] Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994).
[144] Antonio Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?', in *European Journal of International Law* (1991), p. 143.
[145] *ibid*. See below for more details of the case of *van Volsem* v. *Belgium*.
[146] *Ahmet Özkan*, para. 337.
[147] *Ibid*.
[148] *D.* v. *UK*, para. 53.

stressed the "exceptional circumstances"[149] and the "dramatic consequences" of an expulsion:

> "It is not disputed that his removal will hasten his death. There is 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. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts […]. While he may have a cousin in St Kitts […], no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island".[150]

The case certainly establishes that an expulsion may be prohibited where the risk of subsequent suffering would be due not to "possible state actions, but rather, due to the lack of material resources to meet survival requirements".[151] It is to be assumed that, consistent with the case-law concerning prison conditions, the classification of inhuman treatment results from the accumulation of all factors enumerated, namely the lack of shelter, a proper diet, adequate medicine and medical care as well as the absence of social support, all of this combined with an increased risk of infections. In this case, Article 3 applies even to conditions which might otherwise be regarded as 'normal' in a given context, and thus seems to include conditions of extreme poverty as a background against which the legality of expulsions has to be critically considered.

This year, the Court was confronted with a direct comparison between *D.* v. *UK* and very similar circumstances in *Arcila Henao* v. *The Netherlands*.[152] The applicant was a Colombian national infected with HIV and suffering from Hepatitis B. Compared to *D.*, his condition was more stable due to treatment with antiretroviral medication. According to the Netherlands' Medical Advice Bureau of the Ministry of Justice, "if the applicant's treatment were to be stopped, it could be expected that his health would relapse […] giving rise to an acute medical emergency which, failing treatment, would be of a permanent character".[153] The Court established that "the required treatment was *in principle* available in Colombia",[154] but it also noted that "there could be delays in the delivery of medication. Moreover, in public health care institutions it was possible to face a waiting list of one year".[155] However, juxtaposing the applicant's circumstances with those in the *D.* judgment, the Court concluded that:

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[149] *D.*, para. 52.
[150] *Ibid.*
[151] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerpen, 2003), p. 151.
[152] *Arcila Henao.*
[153] *ibid*.
[154] *Ibid*. (emphasis added).
[155] *ibid*.

"it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention. Although the Court accepts the seriousness of the applicant's medical condition, it does not find that the circumstances of his situation are of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3".[156]

Referring to *D.*, the Court noted that "[a]ccording to established case-law, aliens who 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 forms of assistance provided by the expelling state. However, *in exceptional circumstances*, an implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3".[157]

In *S.C.C.* v. *Sweden*, the wife of a Zambian diplomat applied to remain in Sweden after her husband's death, since she had contracted HIV and had started long-term treatment in Sweden. The Court declared her application to be 'manifestly ill-founded', due to the facts that AIDS treatment was available in Zambia and that she had family there. The Court stressed in this case, too: "[O]nly in exceptional circumstances will the implementation of a decision to remove an alien result in a violation of Article 3 by reason of compelling humanitarian considerations".[158]

In *Bensaid* v. *UK*, the applicant, a schizophrenic person suffering from a severe psychotic illness which could be controlled only by ongoing medical treatment, alleged that his removal to Algeria "would cause him a full relapse in his mental health problems"[159] and thus "placed him at risk of inhuman and degrading treatment, and threatened his physical and moral integrity".[160] In Algeria, treatment would only be available to him as an in-patient in a hospital which was 75-80 kilometres away from his home village. His British doctor had documented that "there was a high risk that the applicant would suffer a relapse of psychotic symptoms on being returned to Algeria. The requirement to undertake regularly an arduous journey through a troubled region would make the risk still greater".[161] She pointed out that the suffering would be 'substantial' and that effective treatment for Mr. Bensaid in Algeria would be "very unlikely".[162] The Court considered that "the suffering associated with such a relapse could, in principle, fall within the scope of Article 3".[163] However, the applicant would "[face] the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. […] Nonetheless, medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less

[156] *ibid.*
[157] *Arcila Henao* (emphasis added).
[158] *S.C.C.* v. *Sweden*, Decision of 15 February 2000, no. 46553/99
[159] *Ibid.*, para. 11.
[160] *Bensaid*, para. 3.
[161] *Ibid.*, para. 16.
[162] *ibid.*
[163] *ibid.*, para. 37.

favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention".[164] Three judges in their separate opinions recommended the UK government to reconsider their decision in light of "powerful and compelling humanitarian considerations",[165] without finding that such removal would result in a violation of Article 3.

In the few cases not declared 'manifestly ill-founded', the finding of "exceptional circumstances" and "compelling humanitarian considerations" have played a prominent role. Does, then, the expected risk in the country of origin have to be connected to a "real risk of dying under most distressing circumstances" (as in *D.* v. *UK*[166]), or could a real risk of *living* under the most distressing circumstances, such as in extreme poverty, also give rise to an issue under Article 3? In the 'domestic' case of *Cyprus* v. *Turkey*, the Court found that the Turkish authorities, by restricting the access of Greek Cypriots living in Northern Cyprus to adequate health care, had violated Article 3 due to "discrimination amounting to degrading treatment".[167]

It remains unclear to what extent a person's access to basic means of subsistence in the country of origin must be *ensured*. Is general availability in that country of, for example, medication, sufficient to relieve the expelling state from its responsibility over the fate of the person to be expelled? Or must it also be shown that a person's access to these goods would be *effective*? What if a person might not be able to afford or access basic goods that are otherwise generally, or in principle, available?[168] In *Meho* v. *The Netherlands*, the Court declared an application against an expulsion to Kosovo inadmissible, on the basis that it was "not impossible" for the applicant to have access to the necessary medical treatment there.[169]

Food

While insufficient nutrition has been considered as a factor contributing to human suffering, no separate cases have been brought before the Court which might shed light on the relevance of the availability of adequate nutrition to the applicability of Article 3. In *Hilal v. UK*, the Court found that the UK would violate Article 3 by extraditing a Tanzanian national likely to be imprisoned upon return because prison conditions in Tanzania were found to be "life-threatening", *inter alia* because "[t]he daily amount of food allotted to prisoners [in Tanzania was] insufficient to meet their nutritional needs and even this amount [was] not always provided". [170]

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[164] *Ibid.*, para. 38.
[165] Separate opinions, Judges Bratza, Costa and Greve.
[166] *D.*, para. 53.
[167] ECHR: Cyprus v. Turkey, 10 May 2001, no. 25781/94, Application No. 25781/94, Judgement of 10 may 2001, para. 311.
[168] This question may be of particular importance to immigrants who have sold everything and even indebted themselves to be able to afford their journey to Europe. In recognition of the fact that a durable solution to refugee crises includes the ability of returnees to sustain themselves in their country of origin, UNHCR has incorporated in some of its programmes, e.g. the repatriation of Rwandans returning from Tanzania, material assistance to returnees to enable them to re-settle with a basic start capital.
[169] *Meho* v. *The Netherlands*, Decision 20 January 2004, no. 76749/01.
[170] *Hilal* v. *UK*, 6 March 2001, no. 45276/99, para. 42.

Shelter

In *D.* v. *UK*, the Court rightly considered homelessness as rendering a person particularly vulnerable to health risks. The importance of adequate shelter to a secure a dignified life has received increasing attention in recent international human rights developments. The UN Human Rights Committee, when reviewing the Fourth Periodic Report of Canada, has noted with concern that "homelessness has led to serious health problems and even to death. The Committee recommends that the state party take positive measures […] to address this serious problem".[171] When considering the murder of street children in Guatemala City by agents of the state, the Inter-American Court of Human Rights found that these children had been the "victims of a double aggression": Apart from having been tortured and subsequently killed, the state had also "not prevent[ed] them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the 'full and harmonious development of their personality',[172] even though every child has the right to harbor a project of life."[173]

In an early European case, an applicant claimed a violation of Article 3 when the Belgian state-owned electricity company, upon her failure to pay the electricity bill due to her dire economic situation, had switched off the electricity in her accommodation in the middle of winter, and thus left her and her children without heating. Guided by her understanding of the ECHR as "guarantee[ing] in Article 3 the right for everyone to have the basic goods indispensable for ensuring human dignity", the applicant maintained that "the Belgian authorities had meted out inhuman and degrading treatment, by cutting off the electric power in the past and by threatening to do so in the future".[174] Interestingly, "[t]he company itself had conceded in its brief before the Brussels Court of Appeal that 'the provision of gas and electricity must be regarded in our state as based on the rule of law and in our community as indispensable to human dignity'".[175] The European Commission, however, found that "the cutting off or the threat of cutting off electricity did not reach the level of humiliation or debasement needed for there to be inhuman or degrading treatment" and declared her petition inadmissible.[176] Cassese nevertheless considers the case significant since it asserted that "the concept of human dignity underpinning Article 3 and the prohibition of any treatment or punishment contrary to humanitarian principles embrace *any measure or action* by a public authority, whatever the specific field to which this measure or action appertains".[177]

When considering the destruction of homes by security forces, the Court has usually applied the right to family life and non-interference with the home (Article 8). However, in *Dulas* v. *Turkey*, the Court found that the manner in which Turkish security forces destroyed the home of a 70-year-old woman could "be categorised as

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[171] Human Rights Committee, Concluding Observations on Canada (1999), UN doc. CCPR/C/79/Add. 105, para. 12.
[172] Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989), Preamble, para. 6.
[173] *Villagrán Morales et al.* (the "Street Children" case), Judgment of November 19, 1999, Inter-American Court for Human Rights (Ser. C) No. 63 (1999), para. 191.
[174] Cassese, p. 142.
[175] *Ibid.*
[176] *Ibid.*, p. 143.
[177] *Ibid.*, p. 143 (emphasis added).

inhuman treatment within the meaning of Article 3".[178] The applicant's "home and property were destroyed before her eyes, depriving her of means of shelter and support, and obliging her to leave the village and community, where she had lived all her life. No steps were taken by the authorities to give assistance to her in her plight".[179] Upon finding a violation of, *inter alia*, Article 3, the Court ordered the Turkish government to pay Ms. Dulas a compensation of GBP 5,000 for her destroyed house and barn and GBP 10,000 for non-pecuniary damages.[180]

Personal victimhood or general conditions?

The British government unsuccessfully disputed that *D*.s expulsion would violate Article 3, among other things because "[h]is hardship and reduced life expectancy would stem from his terminal and incurable illness coupled with the deficiencies in the health and social-welfare system of a poor, developing country. He would find himself in the same situation as other AIDS victims in St Kitts".[181] The question to what degree an applicant has to be 'singled out' in order to be considered a victim of a violation has repeatedly been considered by the Court, *inter alia,* in the above mentioned *Kalashnikov* and *Vilvarajah* judgments, however, it has not been consistently answered in the case-law.

An applicant certainly has to show that he or she, in particular, is at risk. As stated above, a 'mere possibility' of victimhood is not sufficient. However, as the Court established in *Kalashnikov*, the fact that many or even most fellow citizens suffer from the same conditions to a similar extent does not diminish an individual's claim to victimhood. Obviously, "[t]he mere fact that […] the risk of inhuman treatment or punishment is shared by the person concerned with many others, makes the treatment or punishment to be feared no less inhuman".[182]

Strikingly, the British government seemed to suggest that the type of hardship Mr. *D*. would experience in St Kitts was due to the *normal* conditions of a poor country and thus not something which would entitle him to human rights protection. The Court, in response to these objections, did not dispute the fact that the lamentable state of the health care system in St Kitts was the everyday reality for many patients there, and it accepted that no public authority could be blamed directly for their suffering. It did, however, reach a different conclusion from the UK government, which it is worthwile quoting at length:

> "It is true that this principle [*non-refoulement*] has so far been applied by the Court in contexts 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 when the

[178] *Dulas* v. *Turkey*, 30 January 2001, no. 25801/94, para. 55.
[179] *Ibid.*, para. 54.
[180] *Ibid.*, paras. 90 and 104.
[181] *D*., para. 42.
[182] van Dijk, p. 146.

> authorities there are unable to afford him appropriate protection.[183] Aside from these situations and 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. It is not therefore prevented from scrutinising an applicant's claim under Article 3 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. 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".[184]

Part III – The scope of *Non-refoulement* under Article 3

Findings from the Case-Law

First, it emerges from the case-law examined that Article 3 covers, in principle, a broad range of treatment and conditions which are considered detrimental to human dignity. While the Court's application of Article 3 does not depend on the *type* of harm considered, it has been limited by the high threshold set for establishing the 'minimum level of severity'. The Court has repeatedly stressed that, in the light of Article 3 being an absolute prohibition, only particularly harsh treatment which seriously compromises human well-being falls into that category, for example acute mental or physical suffering. An element of intent is only strictly required if treatment is to be labelled as 'torture'. The assessment of the gravity of such treatment involves both a subjective and an objective element; the finding of a violation ultimately depends on the effect which an action, omission, or general conditions may have on the personal integrity of the victim which is relative to the particular circumstances in each case.

Second, Article 3 imposes far-reaching positive obligations which have been explicitly or implicitly derived from potential and actual violations. State obligations range from protecting persons against ill-treatment both by state agents and by third persons, to creating conditions in which it is at least possible for a human being to live in dignity. The latter can, in certain circumstances, include the availability of resources to have a person's basic subsistence needs fulfilled.

Third, the extraterritorial effect of Article 3 obliges states to protect human beings against forms of extreme suffering as banned by that article, by refraining from extraditions or expulsions when such suffering can reasonably be expected. Certainly, general conditions producing refugees such as systematic violence, armed conflicts, natural or man-made disasters or extreme destitution do not automatically generate

[183] The Court here refers to *Ahmed* v. *Austria,* para. 44, in which it found that, due to the civil war in Somalia and the disintegration of that state, "[t]here was no indication that […] any public authority would be able to protect him."
[184] *D*., para. 49.

non-refoulement obligations. However, none of these situations can in principle be excluded from providing the background against which an appeal against expulsion must be assessed.

Fourth, the 'absolute' nature of Article 3 means that when ill-treatment upon return can reasonably be expected, an expulsion is not permitted *under any circumstances*. Unlike the prohibition of *refoulement* in Article 33(2) of the 1951 Refugee Convention, and in view of the gravity of the harm to a human being's integrity which Article 3 is designed to protect, neither 'national security' considerations nor the potential criminal record of an immigrant can be invoked as justifying a derogation from the principle of *non-refoulement*. Thus, it may prove a particularly important safeguard in the context of the global 'war on terrorism'. Similarly, economic considerations or responsiveness to the demands of the electorate cannot justify a state's breaching its obligations under Article 3.

Fifth, it is the 'net' amount of the anticipated suffering which determines the legality of an expulsion. The fact that country of origin conditions might be less favourable than those in European host states is irrelevant.

Sixth, the case-law is ambiguous as to whether an applicant has to demonstrate that the risk which he or she is running of being subjected to treatment contrary to Article 3 is significantly higher than that of other persons in similar circumstances. In some cases such as *Hilal*, the Court has used existing patterns of ill-treatment in the country of origin as supporting evidence for a real risk to the applicant; in other cases, such as *H.L.R.*, the Court's has demanded that the applicant demonstrate that his or her situation upon return would be significantly worse than that of the average population. This stands in stark contrast to 'domestic' cases like *Kalashnikov*, where no such 'singling out' of an applicant has been an issue.

Finally, *non-refoulement* under Article 3 has in practice been limited by the heavy burden of proof imposed on an immigrant to demonstrate the 'real risk'. As van Dijk writes, "[t]he case-law shows that an applicant will have to advance strong arguments to convince the Convention organs that there really is a danger of treatment contrary to Article 3" following the deportation.[185] In particular, applicants may have to demonstrate "exceptional circumstances" to have their claim assessed and decided in their favour. Thus, from the case-law examined, it seems that state sovereignty continues to play a somewhat disproportionate role in the expulsion decisions of the Court. This imbalance is surprising given that Professor Bernhardt, a former President of the Court, once suggested that "[t]reaty obligations are in case of doubt and in principle not to be interpreted in favour of state sovereignty. […] Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictions on state activities on the other."[186] Despite illustrative cases in which an expulsion of immigrants resulted in them being tortured upon return, unfortunately, no considerations 'not to make the same mistake twice' have informed the Court's subsequent reasoning towards relaxing its strict interpretation of the 'real risk' criterion.[187] However, not all the

[185] van Dijk and van Hoof, p. 325.
[186] Orakhelashvili, p. 534.
[187] This problem is probably mainly due to the fact that expulsion cases concern future, anticipated violations rather than evidenced committed crimes as in domestic proceedings; generally, judicial

burden of establishing such risk lies on the applicant. Instead, one of the positive obligations that Article 3 imposes is to make sure that country of origin conditions are acceptable so as to allow for a lawful expulsion. Hence, a state that expels an immigrant without first ensuring themselves of the absence of a 'real risk' of inhuman treatment might, by such omission alone, breach their human rights obligations.

Implications

The facts that there can never be certainty about future events, and that state failure or a 'real' risk can hardly be 'proven' in the same way that past violations can be documented in criminal trials, has not been given due weight by the Court. Too strict an application of the real risk criterion *de facto* undermines, to some extent, the broader interpretation Article 3 has otherwise been given over the years. In order to avoid such dramatic mistakes as in *Vilvarajah*, European states in their national immigration policies may need to lower their requirement for too strict an 'evidence' of a 'real risk' to be demonstrated by the applicant. As Hathaway writes, "it is ironic that courts have shown a marked reluctance to recognize as refugees persons whose apprehension of risk is borne out in the suffering of large number of their fellow citizens. Rather than looking to the fate of other members of the claimant's racial, social, or other group as the best indicator of possible harm, decision-makers have routinely disenfranchised refugees whose concerns are based on generalized, group-defined oppression".[188] In addition, Noll suggests that "[t]he greater [an expected] violation, the lesser probability for its materialisation is required to trigger obligations incumbent on a member state".[189]

Certainly, the impact of the Strasbourg jurisprudence goes far beyond the individual cases. While the Court has noted that "it is not its function to review *in abstracto* the compatibility of the asylum regulations of the respondent state with the Convention",[190] its judgments should be understood as authoritative interpretations of European states' human rights obligations. Indeed, various judgments of the Court have eventually led to changes in national legislation. In particular, "*Soering* had an enormous impact on the asylum policies of the Council of Europe member states".[191] The Dutch asylum policy, for example, was altered in response to the *Vilvarajah* case to include an administrative directive (*Gedoogdenregeling*) not to return persons to certain countries "even after their application for admission had been rejected, because the general situation prevailing in those countries made expulsion inappropriate".[192] As a result, asylum seekers with a 'well-founded fear' of an Article 3 violation would be granted a residence permit, whereas those who cannot establish a particular individual risk but who *may* be subjected to inhuman or degrading treatment judging from the general situation in their country would only be 'tolerated', having their expulsion postponed for as long as the dangerous situation continues in their country of origin.[193] Certainly, more immigrants are legally

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mechanisms are disproportionately more cumbersome when it comes to ordering preventative measures as opposed to retroactively punishing crimes.

[188] Hathaway, *The Law of Refugee Status* (1991), p. 90.

[189] Noll, p. 10.

[190] *G.H.H. and Others* v. *Turkey*, 11 July 2000, no. 43258/98, para. 34.

[191] Lawson and Schermers, p. 328.

[192] van Dijk, p. 144.

[193] van Dijk, pp. 144-145.

protected from expulsion under Article 3 ECHR than is currently being acknowledged by the proposed EU Directive on 'subsidiary protection'. The latter, like the 1951 Convention and the African and Latin American instruments, contains an exhaustive nexus requirement to certain categories of events which are recognised as valid grounds for refugee claims. While the latest Proposal set out to 'be in line with international human rights law', it is essentially only a codification of *minimum* standards and does not "result from a comprehensive and systematic analysis of all protection possibilities within international human rights law".[194]

Although cases confirming adverse social and economic conditions as generating *non-refoulement* obligations have been rare, they might nevertheless serve to reinforce legal and/or humanitarian considerations in states' asylum policies.[195] Before the Strasbourg Court, there have been various cases during whose proceedings the host state and the immigrant "reached [a friendly] settlement, on the basis of respect for human rights as defined in the Convention",[196] as a result of which a states granted residence permits or at least refrained from deportation. Lambert notes also the progressive impact that the Strasbourg jurisprudence has had on the Human Rights Committee and the Committee against Torture. She concludes that "[i]n this sense, […] the work of the Strasbourg organs on *non-refoulement* is of a norm-creating character".[197]

The repeated reference by the Court to 'humanitarian considerations' in some successful cases has led van Krieken to conclude that it was "considerations of a humanitarian nature rather than a strict legalistic approach in terms of the Convention [that] have resolved these cases in favour of the applicants".[198] However, this conclusion seems to rely unduly on the assumption of the existence of a dichotomy between social and economic rights on the one hand and civil and political rights on the other. Rather than as having been moved by compassion, the Court's judgment in *D*. should be regarded as acknowledging that basic health care, adequate nutrition and shelter may be as essential an ingredient of a dignified life as is the protection against unjustified suffering due to persecution and violence.

The significance in acknowledging immigrants' *entitlement* to international protection as opposed to considering them the beneficiaries of charitable concessions lies in their subsequent treatment in the host state. It is hard to think of a non-discriminatory reason which would justify why they should not be granted the same rights and benefits as Convention refugees. By analogy with the above-cited case of *Cyprus* v. *Turkey,* denying healthcare to a specific group of people such as 'illegal' immigrants,

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[194] McAdam, p. 2.

[195] For example, a policy document of the Immigration and Nationality Department of the British Home Office notes that "there may be cases where it is apparent that there are no facilities for treatment available in the applicant's own country. Where evidence suggests that this absence of treatment significantly shortens the life expectancy of the applicant it will normally be appropriate to grant leave to remain".[195] For further details, see *D*. v. *UK*, para. 28.

[196] *Abdurrahim Incedursun*, para. 23.

[197] Lambert, p. 544.

[198] Peter van Krieken, 'Migration and Health: The Many Links', http://heiwww.unige.ch/conf/ psio_ 2305 02/files/van_krieken.pdf, p. 8. "From the strictly legal point of view the finding by the Court that *D*.'s deportation to St. Kitts would amount to inhuman treatment, (a) does not automatically lead to a right to remain in the country and (b), still less does it confer a right to benefit from a social security system to which others have made contributions (…)"

may constitute "discrimination amounting to degrading treatment".[199] Where European states limit the rights of immigrants protected by *non-refoulement* to a mere abstention from removing them, yet do not grant them any rights which would enable them to lawfully pursue a basic income, states might be exposing them to such destitution as can amount to indirect or *de facto* expulsion. In addition to Article 3, it remains for other provisions of the ECHR to address the extent to which the treatment of immigrants in Europe must be brought in line with states' human rights obligations.

Obviously, *non-refoulement*, however broadly defined and essential to safeguard persons' most fundamental human rights, is in itself by far not a satisfactory response to refugee movements. The conditions condemned by the Court as 'inhuman' in *Hilal* and *Kalashnikov* strongly resemble conditions of severe poverty which are the everyday reality of millions of people in the world[200] and which are regular causes of migration movements. In individual cases, it is imaginable that states might continue to expel immigrants whose human rights are endangered due to social and economic predicaments, by supporting their 'reintegration' in countries of origin through material assistance. However, it is to be hoped that European states undertake more serious efforts to address root causes of forced migration instead of investing ever more resources in expulsions or failing attempts to prevent undesired immigration.

Conclusion

Because of its absolute protection against inhuman treatment "whatever the source",201 Article 3 ECHR considerably widens the international protection against refoulement compared to other refugee law and human rights instruments. The Article might protect those who a) successfully reach or already are on European territory, b) can demonstrate that their expected suffering upon return would be exceptionally severe according to the high threshold established in European jurisprudence, and c) can demonstrate an - equally strictly applied - high probability of the anticipated harmful treatment or suffering. The cases examined demonstrate that adverse social and economic conditions may in principle constitute valid grounds for claims of an Article 3 violation. As Hailbronner writes, "the borderline between cases like D. v. UK and other cases in which a person may be exposed to extremely bad living conditions may be very difficult to draw",202 a fact which further serves to weaken a priori assumptions about the possibility to clearly distinguish 'genuine' refugees from 'economic migrants'.

With the growing influences of the doctrine of the indivisibility of human rights and the 'integrated approach', i.e. the "protect[ion] or at least tak[ing] into account [of] social and economic rights" by supervisory organs of mainly civil and political treaties such as the European Convention,[203] we may anticipate issues of severe

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[199] *Cyprus* v. *Turkey*, 10 May 2001, no. 25781/94, Application No. 25781/94, para. 311.

[200] "In developing countries alone, 1.2 billion people lack access to drinkable water and 2.4 billion have no access to sanitation." OHCHR, <www.unhchr.ch/html/menu6/2/OHCHR.pdf>.

[201] Lambert, p. 543.

[202] Kai Hailbronner, 'Principles of international law regarding the concept of subsidiary protection', in Daphne Bouteillet-Paquet, *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002), p. 8.

[203] Martin Scheinin, 'Economic and Social Rights as Legal Rights', in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights* (2001), p. 32.

poverty, such as homelessness, to figure more prominently in international human rights jurisprudence, such as the right to life or to human dignity, which could in turn further broaden the scope of *non-refoulement*. At the moment, the vagueness of what constitutes sufficient suffering, a real risk or 'exceptional circumstances', leave both potential applicants and states uncertain about the extent of their rights and obligations. On the one hand, such "an assembly of vague terms may develop into an impediment for a more efficient procedural system".[204] On the other hand, such vagueness may also serve to ensure flexibility in expulsion procedures in order to constantly adapt human rights protection to the reality of a changing world.[205]

Certainly, the boundaries of Article 3 concepts as established in the case-law of the Court have made it "clear that its jurisprudence is not meant as an invitation for all persons living in bad economic and social conditions to make their way to Western Europe".[206] It has, however, also made it clear that European states must refrain from expelling immigrants if such an expulsion would amount to "inhuman treatment" because of any kind of grave enough adverse conditions or treatment awaiting them in their country of origin. Thus, Article 3 ECHR may significantly narrow the gap of international refugee protection in favour of those who need it.

[204] Hailbronner, p. 8.
[205] *Cf.* the deliberate absence of a definition of 'persecution' in the 1951 Refugee Convention.
[206] Hailbronner, p. 8.

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