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Mavronicola, Natasa

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Relatively absolute? The undermining of Article 3 ECHR in *Ahmad* v *UK*

Natasa Mavronicola and Francesco Messineo*

The recent decision of the Fourth Section of the ECtHR in *Ahmad v UK* dangerously undermines the well-established case-law of the Court on counter-terrorism and *non-refoulement* towards torture, inhuman and degrading treatment or punishment. Although ostensibly rejecting the 'relativist' approach to Article 3 ECHR adopted by the House of Lords in *Wellington*, the Court appeared to accept that what is a breach of Article 3 in a domestic context may not be a breach in an extradition or expulsion context. This statement is difficult to reconcile with the *jurisprudence constante* of the Court in the last fifteen years. The Grand Chamber will hopefully reaffirm the view that Article 3 ECHR is an absolute right in all its applications, including *non-refoulement*, regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur.

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INTRODUCTION

Only rarely do decisions by the European Court of Human Rights ('ECtHR') elicit positive responses from the UK government and the UK media at the same time. A recent exception was the unanimous judgment of the Fourth Section of the European Court of Human Rights ('ECtHR') in *Babar Ahmad and others v UK*, which found that there would be no breach of Article 3 of the European Convention on Human Rights ('ECHR') in extraditing a number of terrorist suspects to face trial and probably imprisonment in 'super-maximum security' detention facilities in the United States of America.[1] The decision was hailed in some quarters as the first sign of the ECtHR finally showing a common sense

* Respectively PhD candidate, University of Cambridge and Lecturer in Law, University of Kent, Canterbury; N.M. wishes to thank Professor David Feldman for being a source of wisdom and support; F.M. wishes to express many thanks to the SHARES Project on Shared Responsibility in International Law at the Amsterdam Centre for International Law (University of Amsterdam) for their kind hospitality while he finalised this note. Both authors would like to thank Fiona De Londras and Brian Sloan for very helpful comments on a previous draft. The usual disclaimers apply. The law is current to the best of our knowledge as of the end of July 2012.

[1] *Babar Ahmad and others v UK* App Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012 (*Ahmad* hereinafter).

approach to terrorism and human rights.[2] In fact, certain aspects of the decision undermine the well-established jurisprudence of the Court on the relationship between counter-terrorism and the prohibition of torture, inhuman and degrading treatment or punishment. Even if the judgment formally rejected the 'relativist' approach to Article 3 ECHR adopted by the House of Lords in *Wellington v. Secretary of State for the Home Department*,[3] some concessions to the line of reasoning of the minority in the House of Lords imply a turn towards 'relativism' in the threshold of inhuman or degrading treatment in a *non-refoulement* context. In this article, we argue that this is a most unfortunate departure from the *jurisprudence constante* of the Court in the last fifteen years.[4] The Grand Chamber will hopefully once again reaffirm, as it has recently done in *Saadi*, that Article 3 ECHR is an absolute right in all its applications, including *non-refoulement*, regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur.[5]

The six applicants in *Ahmad* – Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan, Mustafa Kamal Mustafa (Abu Hamza), Adel Abdul Bary and Khaled Al-Fawwaz – were all the subject of extradition requests made by the United States to the United Kingdom. Their indictments ranged from an Internet-based conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country (Babar Ahmad, Syed Tahla Ahsan) to over 269 counts of murder (Khaled Al-Fawwaz). The applicants claimed that, if extradited to the USA, they would face treatment contrary to Article 3 ECHR.

Article 3 ECHR prohibits torture and inhuman or degrading treatment or punishment.[6] The provision has been consistently construed as encompassing a prohibition of *refoulement* (any form of rejection at the frontier, deportation, expulsion or extradition) towards territories where there is a real risk that a prohibited treatment will occur.[7] The applicants' claim was based primarily on the realistic prospect of being imprisoned in a 'super-max' security prison, ADX

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[2] The UK Home Secretary 'welcomed' the decision: http://www.homeoffice.gov.uk/media-centre/news/Abu-Hamza [last accessed 24 July 2012]. See also 'Abu Hamza extradition ruling praised by David Cameron', The Guardian, 10 April 2012, available at http://www.guardian.co.uk/uk/2012/apr/10/abu-hamza-extradition-praised-david-cameron [last accessed 24 July 2012]; J. Rozenberg, 'European court makes the right call on Abu Hamza', The Guardian, 10 April 2012, available at http://www.guardian.co.uk/law/2012/apr/10/european-court-abu-hamza-strasbourg [last accessed 24 July 2012]; 'Leading article: A ruling that confounds Strasbourg's critics', The Independent, 10 April 2012, available at http://www.independent.co.uk/opinion/leading-articles/leading-article-a-ruling-that-confounds-strasbourgs-critics-7631193.html [last accessed 24 July 2012]; T. Whitehead and M. Beckford, 'Landmark victory to send Hamza and terror suspects to US', The Daily Telegraph, 10 April 2012, available at http://www.telegraph.co.uk/news/uknews/law-and-order/9195959/Landmark-victory-to-send-Hamza-and-terror-suspects-to-US.html [last accessed 24 July 2012].

[3] *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72.

[4] At least since *Chahal v UK* (1997) 23 EHRR 413.

[5] See *Saadi v Italy* (2009) 49 EHRR 30. See n 82 below.

[6] 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

[7] See *Soering v UK* (1989) 11 EHRR 439; this was confirmed in in more than 45 ECtHR judgments since then. A list of judgments until August 2008 may be found in K. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp; Oxford; Portland: Intersentia, 2009), 189; see generally N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe, 2010).

Florence in Colorado.[8] In the applicants' view, conditions of detention there, which were likely to be exacerbated through the application of 'special administrative measures', would breach Article 3 *inter alia* because of the prolonged periods of solitary confinement.[9] They also argued that, if convicted, they would probably face mandatory sentences of life imprisonment without any possibility of parole or other very long sentences. They submitted that this could also amount to a breach of Article 3, because the sentences would be de facto irreducible or grossly disproportionate.[10]

The first complaint, regarding conditions of detention, was held inadmissible in relation to the fourth applicant, Abu Hamza, because the Court upheld its previous finding that, given his severe health condition, there was 'no real risk of his spending anything more than a short period of time at ADX Florence'.[11] The second applicant, Haroon Rashid Aswat, also posed a special case according to the Court because of his health conditions, and his complaint was adjourned.[12] As to the other applicants, the Court found, first, that the conditions of detention at ADX Florence, despite their 'highly restrictive' nature, would not be in breach of Article 3 ECHR.[13] Second, the prospective long periods of imprisonment did not render the extradition incompatible with Article 3. In the Court's view, a mandatory life sentence without possibility of parole would not be '*per se* incompatible with the Convention', but simply 'more likely to be grossly disproportionate' and thus incompatible with Article 3 ECHR.[14] The applicants were unable to show, at this point in time, that their sentences would be grossly disproportionate to the offences they were accused of and so could not prove a real risk of breach of Article 3.[15]

The judgment raises many interesting questions, only some of which will be addressed here. We do not assess the accuracy of the Court's finding that conditions of detention at ADX Florence do not constitute inhuman or degrading treatment;[16] nor do we discuss whether the Court was correct in finding that life imprisonment without parole can, in certain circumstances, be considered compatible with Article 3.[17] Our analysis will focus on the more general remarks of the Court as to the *non-refoulement* obligations under Article 3 of the

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[8] The United States Penitentiary Administrative Maximum Facility (ADX) is a male federal high security prison in Florence, Fremont County, Colorado. For media commentary on this type of prison, see E. Pilkington, 'ADX Florence super-max prison: the Alcatraz of the Rockies', The Guardian, 10 April 2012, available at http://www.guardian.co.uk/world/2012/apr/10/abu-hamza-isolation-supermax-prison [last accessed 24 July 2012]; S. Shane, 'Beyond Guantánamo, a Web of Prisons for Terrorism Inmates', The New York Times, 10 December 2011, available at http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html [last accessed 24 July 2012].

[9] *Ahmad*, [186]-[196].

[10] ibid, [231]-[234].

[11] ibid, [5] and [217]. See also the admissibility decision: *Babar Ahmad and others v UK* Application Nos 24027/07, 11949/08 and 36742/08, Admissibility Decision of 6 July 2010.

[12] Those complaints will now be considered under a new application number: 17299/12.

[13] *Ahmad*, [218]-[224].

[14] ibid, [242].

[15] ibid, [235]-[244].

[16] For a critical consideration of the conditions in such prisons, see C. Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton: Princeton University Press, 2011)

[17] For a brief analysis of recent ECtHR judgments on this topic, see 'Life imprisonment: extradition - United States - Harkins v United Kingdom (9146/07)' (2012) 3 EHRLR 332 and 'Life imprisonment: criminal law - sentencing - whole life tariff - Vinter v United Kingdom (66069/09; 130/10; 3896/10)' (2012) 3 EHRLR 336.

Convention.[18] In order to do so, we will first briefly recall the established jurisprudence on the absolute nature of Article 3 ECHR and the scope and content of *non-refoulement* obligations under the ECHR; second, we will address the 'relativist' approach to these obligations adopted by the House of Lords in *Wellington*; third, we will scrutinise the incomplete rejection of such a 'relativist' approach by the ECtHR in *Ahmad*.

ARTICLE 3, RELATIVISM AND ABSOLUTISM

The absolute nature of Article 3 ECHR

It is generally accepted that Article 3 enshrines an absolute right.[19] The absolute nature of Article 3 ECHR lies in three key elements: it admits of no qualifications or exceptions; it cannot be subject to derogation under Article 15 ECHR; and it applies to everyone no matter what.[20] The consistently reiterated approach of the Court is that:

> The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention … Article 3 makes no provision for exceptions and, under Article 15 (2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.[21]

This reflects the idea, put forward by theorists such as Gewirth, that an absolute right is one that can never be justifiably infringed and must be fulfilled without exception.[22] At a time when global discourse on the 'ticking bomb' scenario abounds,[23] the ECtHR's Grand Chamber has recently addressed the threat of torture of a kidnapper with a view to discovering the whereabouts and potentially saving the life of a kidnapped child:

> The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of art.3.[24]

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[18] ibid, [162]-[179].

[19] See eg D.J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (London: Butterworths, 1995), 69. Jacobs, White and Ovey, *The European Convention on Human Rights*, R. C. A. White and C. Ovey eds, 5th edn (Oxford: Oxford University Press, 2010), ch 9; S. Foster, *Human Rights & Civil Liberties*, 2nd edn (Essex: Pearson Education, 2008), 27; D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford: Oxford University Press, 2002), 242.

[20] See *Ireland v UK* (1979-80) 2 EHRR 25, [163]. For further analysis on the concept of an absolute right, see N. Mavronicola, 'What is an "absolute right"? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights' (2012) 12 HRLR (forthcoming).

[21] *Ireland v UK*, n 20 above, [163]. .

[22] A. Gewirth, 'Are There Any Absolute Rights?' (1981) 31 (122) *The Philosophical Quarterly* 1.

[23] The literature on the topic is vast. Compare eg A.M. Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2003) 48 *N.Y.L. Sch. L. Rev.* 275 with H. Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) 37 *Case W. Res. J. Int'l L.* 231. From a political perspective, see R. Blakeley, 'Why Torture?' (2007) 33 *Review of International Studies* 373.

[24] *Gäfgen v Germany* (2011) 52 EHRR 1, [87].

These statements confirm that the right enshrined in Article 3 cannot be balanced away on the basis of consequentialist concerns, unlike, for instance, Articles 8-11 ECHR.[25]

Some scepticism, however, arises in relation to the interpretation and application of this absolute right. The terms 'torture', 'inhuman' and 'degrading' are contestable and difficult to define, yet it is the Court's task to interpret and apply them.[26] The Court's approach is fact-sensitive, especially when it comes to establishing the minimum threshold. In the words of the Court, '[t]he assessment of this minimum is, in the nature of things, *relative*; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc'.[27] Reference is also made to the 'nature and context of the treatment' as the 'circumstances of the case'.[28] This context-specific approach has led some commentators to cast the absolute nature of Article 3 as 'relative'. For instance, although Feldman states that obligations under Article 3 are 'absolute, non-derogable and unqualified',[29] he remarks that 'a degree of relativism cannot, in practice, be entirely excluded from the application of the notions of inhuman or degrading treatment'.[30] Fenwick asserts that '…[the standard of treatment that qualifies as Article 3 ill-treatment] does not connote an absolute standard and, in its application, it allows for a measure of discretion'.[31]

In practice, the assessment of the Court is indeed context-specific and, in that sense, relative. The crucial question, however, is which are the legitimate factors and circumstances to be taken into account in the interpretation and application of Article 3. This problem cannot be fully analysed here, but three brief examples may help to illustrate the significance of this question. The imprisonment, for lawful reasons, in a regular police cell of a healthy adult person will not be considered inhuman or degrading. The imprisonment in such a cell of a severely disabled Thalidomide victim will.[32] Similarly, in determining whether a punishment is inhuman or degrading, the proportionality of the punishment to the conduct of the person in question is a legitimate factor to consider.[33] Thus, a term

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[25] On the notion of a hierarchy of human rights within the ECHR, see A. Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin J Goold and Liora Lazarus (eds), Security and Human Rights (Oxford: Hart Publishing, 2007), 212. Beyond ECHR discourse, see T. Koji 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights', (2001) 12 (5) EJIL 917; D. Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners', (2002) 65 *Saskatchewan Law Review* 332.

[26] See J. Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: OUP 2012), ch 9; see also M. K. Addo and N. Grief, 'Does Article 3 Enshrine Absolute Rights?' (1998) 9 EJIL 510.

[27] *Ireland v UK*, n 20 above, [162] (emphasis added).

[28] *A v UK* (1999) 27 EHRR 611, [20].

[29] Feldman, n 19 above, 242.

[30] ibid.

[31] H. Fenwick, *Civil Liberties and Human Rights*, 3rd edn (London: Cavendish Publishing, 2004), 44-45.

[32] See *Price v UK* (2002) 34 EHRR 53.

[33] For an overview of the use of proportionality in a penal context, see A. Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law Journal* 263. This test must be distinguished from the proportionality test in wider human rights discourse. Regarding the potential detrimental implications of proportionality discourse under Article 3, see S. Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality', (2006) 65(2) *Cambridge Law Journal* 438. On proportionality more generally, see (a minimal selection out of a rich discourse): B. Goold, L.

of 10 years' imprisonment in a standard adult prison meted out to a 30-year-old man convicted of armed robbery can be legitimately distinguished from the same term inflicted on a 70-year-old man convicted of tax evasion. As a third example, consider the shooting of someone in the leg. It certainly causes a great deal of physical and probably mental suffering. Shooting someone in the leg when he is in custody, for the purpose of obtaining some information from him would probably be considered by the Court to fall within the definition of torture.[34] The shooting of a protester in the leg by a police officer on duty for no particular reason will, at the least, be seen to amount to inhuman treatment.[35] Yet if a police officer took the shot as the minimum measure necessary to incapacitate a person who is in the process of attacking the police officer or a nearby third party with a knife, such shooting would not amount to inhuman or degrading treatment.[36] Similarly, high security conditions stemming from and directed exclusively at averting a danger posed by an individual to the physical integrity of others may, if they sufficiently respect the dignity of that individual, be compatible with Article 3.

This 'relativism' in the application of Article 3 does not undermine its absolute nature but lies within the legitimate interpretation and application of its terms. This suggests that the key underlying legitimate concerns which come into play are the agency and dignity of individuals.[37] Although the Court takes into account many factors, some circumstances must be seen as irrelevant and/or illegitimate in the identification of treatment as inhuman, degrading or torturous. Treatment is no more or less in breach of the ECHR depending on the colour of the individual's hair, what the perpetrators had for breakfast, or, more importantly here, the geographical location where treatment takes place.[38] The irrelevance of the geographical location is enshrined in the *non-refoulement* obligation, to which we will now turn.[39]

Non-refoulement obligations under the ECHR

The construction of Article 3 ECHR as implying *non-refoulement* obligations dates back to the 1970s,[40] but came to fruition only in 1989 with the *Soering* case.[41] The

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Lazarus and G. Swiney, Public Protection, Proportionality and the Search for Balance (Ministry of Justice Research Series, 10/07, September 2007); M. Cohen-Eliya and I. Porat, 'American balancing and German proportionality: the historical origins' (2010) 8(2) *International Journal of Constitutional Law* 263.

[34] For a critical analysis on the component elements of torture under the ECHR, see C. McGlynn, 'Rape, torture and the European Convention on Human Rights' (2009) 58(3) ICLQ 565-595.

[35] See, eg, *Güler and Öngel v Turkey* App Nos 29612/05 and 30668/05, Judgment of 4 October 2011.

[36] For the approach of the ECtHR to the use of force in such contexts, see: *Güler and Öngel* (ibid); *Muradova v Azerbaijan* (2011) 52 EHRR 41; *Rehbock v Slovenia* (1998) 26 EHRR CD120. The third example is adapted from N. Mavronicola, '*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg's discourse on the justified use of force' (2013) MLR (forthcoming).

[37] For a critical assessment of dignity's many faces, see C. McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19 EJIL 655.

[38] See *Saadi*, n 5 above, [138] and the discussion below.

[39] The identification of treatment as inhuman or degrading or as amounting to torture is a distinct question from the issue of extra-territorial jurisdiction under Article 1 ECHR, which we are not addressing here.

[40] See e.g. *X v Federal Republic of Germany* (1974) 1 DR 73. See A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in R.S.J. MacDonald (ed), *The*

ECtHR has reaffirmed and expanded upon this construction in many cases since.[42] The basis for this development was simple: Article 3 protects individuals who are within a Contracting State's jurisdiction from proscribed treatment. As such, this protection applies regardless of whether the treatment is inflicted directly in the Contracting State or will be inflicted somewhere else at a later date.[43] In the latter case, a Contracting State's responsibility under Article 3 is engaged when 'substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country'.[44] According to the Court, this 'liability [is] incurred … by reason of … having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.[45] The expulsion of a person by a Contracting State to another State where they face a real risk of proscribed treatment is thus a breach of Article 3.

While international refugee lawyers have been quick to recognise that this construction of Article 3 provided a complementary form of international protection in Europe in addition to the 1951 Convention on the Status of Refugees,[46] Article 3 ECHR was by no means limited to those seeking asylum from persecution.[47] The resulting obligation not to deport, expel, extradite, reject at the frontier or otherwise '*refoule*' someone at risk admits no limitation or exception. Anyone, including 'a suspected terrorist', has a right not to be sent to a territory where they face a real risk of torture, inhuman or degrading treatment or punishment. In *Saadi v Italy*, the UK as an intervening party had tried to argue that a distinction ought to be made between treatment inflicted at home and treatment inflicted by the authorities of *another* (non-Contracting) State, which 'should be weighed against the interests of the community as a whole', for example in cases involving suspected terrorists. This was one of the many attempts on the part of the UK at altering the Court's jurisprudence on the relationship between terrorism and *non-refoulement*.[48] The Grand Chamber strongly rejected the UK government's arguments, reaffirming that the protection granted by Article 3 ECHR was absolute:

European system for the protection of human rights (Dordrecht: Martinus Nijhoff, 1993) 225-261, 248-249.

[41] n 7 above. This section is partly adapted from F. Messineo, 'Non-refoulement Obligations in Public International Law: Towards a New Protection Status?', in S. Juss (ed.), *Research Companion to Migration Theory and Policy* (Ashgate, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802800 [last accessed 24 July 2012], 12-15.

42 n 7 above.

[43] As to the relevance of prohibited treatment carried out by non-state actors, see eg *HLR v France* (1998) 26 EHRR 29, [40].

[44] *HLR v France*, n 43 above, para 34; *Chahal v UK*, n 4 above, [74].

[45] *Soering*, n 7 above, [91].

[46] See eg H. Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', 24 *Refugee Surv. Q.* (2005) 39-55. See also Article 2(e) and Article 15(b), EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal L* 304, 30/09/2004 p. 12.

[47] See V. Chetail, 'Le droit des réfugiées à l'épreuve des droits de l'homme: bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants', 37 *Revue belge de droit int.* (2004) 156, at 194-195.

[48] See *Chahal*, n 4 above, [79]-[80].

> the Court cannot accept the argument of the UK Government, supported by the respondent Government, that a distinction must be drawn under art.3 between treatment inflicted directly by a signatory state and treatment that might be inflicted by the authorities of another state, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. [citation omitted] Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule.[49]

In sum, under the established case law of the ECtHR as reaffirmed by the Grand Chamber three years before *Ahmad*, Article 3 ECHR encompassed an absolute prohibition of *refoulement* of those facing a real risk of any form of Article 3-proscribed ill-treatment. The fact that the prohibited treatment would occur somewhere else and that the person was accused of certain crimes rather than others were not legitimate circumstances to take into account when assessing the risk of ill-treatment.

The House of Lords in *Wellington*

Having failed to prompt a change to the Strasbourg Court's approach, the UK government persisted in its advocacy of more 'relativist' interpretations of Article 3 before its own domestic courts. It eventually succeeded in persuading the majority of the House of Lords in *Wellington* to adopt a more restrictive reading of the provision. According to Lord Hoffmann, Baroness Hale and Lord Carswell, it was possible to draw a distinction between extradition cases and other *non-refoulement* cases, because the interests of justice should be taken into account in the context of extradition.[50] Relying on the ambiguity of the *Soering* case in that regard,[51] Lord Hoffmann put it in the following terms:

> [The ECtHR's language in *Soering*] make[s] it clear that in cases of extradition, article 3 does not apply as if the extraditing state were simply responsible for any punishment likely to be inflicted in the receiving state. It applies only in a modified form which takes into account the desirability of arrangements for extradition.[52]

According to Lord Hoffmann, while there was no question that a risk of torture implied an absolute prohibition, the situation as to inhuman and degrading

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[49] *Saadi*, n 5 above, [138]. A different approach was notoriously adopted by the Canadian Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, [78].

[50] *Wellington*, n 3 above, [22]-[24], [36], [48], [51]-[58].

[51] *Soering*, n 7 above, [89]: '[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.'

[52] *Wellington*, n 3 above, [22].

treatment was 'more complicated'[53] because the assessment of what constitutes inhuman or degrading treatment must be made by reference to the context, including the fact that the person might otherwise escape justice. This implied a distinction between what would breach Article 3 in the domestic context, and what would breach Article 3 in an extradition context:

> [T]he desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the "minimum level of severity" which would make it inhuman and degrading. *Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account*.[54]

Lord Brown and Lord Scott disagreed. As Lord Scott put it, the majority's reasoning implied a 'relativist' approach to Article 3:

> It is accepted that the absolute nature of the article 3 bar on torture would bar extradition to a country where the extradited person would face torture and that that which would constitute torture for article 3 purposes in Europe would constitute torture for those purposes everywhere. But it is suggested that treatment or punishment that might for article 3 purposes be inhuman or degrading in Europe would not necessarily need to be so categorised if it were treatment or punishment likely to be faced in the requesting country by a person faced with extradition to that country for crimes committed there. But, if that is so, how can it be said that article 3 rights not to be subjected to inhuman or degrading treatment are absolute rights?[55]

This, Lord Scott considered, was incompatible with the absolute nature of Article 3 ECHR: '[T]he standard of treatment or punishment apt to attract the adjectives "inhuman or degrading" for article 3 purposes ought to be a constant. I do not see how otherwise the article 3 prohibition regarding such treatment or punishment can be regarded as an absolute one'.[56] In Lord Brown's view, both *Chahal* and *Saadi* had confirmed as much.[57]

The ECtHR rejected *Wellington* but then adopted its own 'relativism'

The *Wellington* case was discussed at length by the Fourth Section of the ECtHR in *Ahmad*. Before assessing the merits of the applicants' claim, the ECtHR sought to address the underlying question of how the *Soering* jurisprudence on *non-refoulement* must be applied in extradition cases. The majority of the House of Lords in *Wellington* considered that there was a tension between *Soering* and *Chahal*,[58] a matter which called for clarification. The ECtHR identified three key distinctions drawn by the majority of the House of Lords in *Wellington* in relation to the interpretation and application of Article 3 ECHR:

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[53] ibid, [23].
[54] ibid, [24] (emphasis added).
[55] ibid, [40].
[56] ibid, [41].
[57] ibid, [85]-[90].
[58] See n 3, n 7 and n 4 above respectively.

a) a distinction 'between extradition cases and other cases of removal from the territory of a Contracting State';[59]
b) a distinction 'between torture and other forms of ill-treatment proscribed by Article 3' (that is, inhuman or degrading treatment or punishment);[60]
c) a distinction 'between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context'.[61]

The Court gave short shrift to the first two distinctions. It made clear that 'the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State'.[62] This was tied to the Court's unequivocal position in *Chahal* that the basis for seeking the extradition of an individual, notably their commission of criminal offences, cannot be a 'balancing point' requiring a higher level of risk of Article 3 treatment to bar expulsion.[63] This was a clear rejection of the problematic 'balancing' discourse in *Wellington*.

Second, the Court acknowledged that it had 'always distinguished between torture on the one hand and inhuman or degrading punishment on the other'.[64] However, it added that this distinction was almost impossible to draw in a speculative manner through a prospective assessment. For this reason, the Court had always refrained from determining whether the ill-treatment faced on expulsion should be characterised as torture or inhuman or degrading treatment or punishment.[65] The Court clarified that whether the risked treatment would be torture or inhuman or degrading treatment or punishment, the effect of a real risk of such treatment in the receiving State was the same: expulsion would amount to a violation of Article 3 ECHR and therefore constitute a breach of the Convention.

Things became much more complex as the Court addressed the third distinction. The Court appeared initially to take a strong stance, rejecting the idea that the assessment of the 'minimum level of severity' test could vary between domestic and extra-territorial contexts. It addressed head-on the *Soering* 'balancing' dicta,[66] which, despite having been overcome by *Chahal*,[67] was a cornerstone of the UK strategy to temper the absolute prohibition on *refoulement* and as such was relied upon by the majority in *Wellington*:

> The Court recalls its statement in *Chahal* … that it was not to be inferred from paragraph 89 of Soering that there was any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 was engaged. It also recalls that this statement was reaffirmed in *Saadi v. Italy*, … where the Court rejected the argument advanced by the United Kingdom Government that the risk of ill-treatment if a person is returned should be balanced against the danger he or she posed. In *Saadi* the Court also found that the concepts of risk and

[59] *Ahmad*, [167].
[60] ibid.
[61] ibid.
[62] ibid, [168].
[63] *Chahal* (n 4 above), [81]. This paragraph is only mentioned by the Court in its consideration of the third distinction – see *Ahmad*, [172].
[64] *Ahmad*, [170]. It is not clear why the Court only refers to 'punishment'.
[65] ibid, [171]-[172]. See *Chahal* (n 4 above), [79]-[80] and *Saadi* (n 5 above), [125].
[66] n 51 above.
[67] n 4 and n 63 above.

> dangerousness did not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other" (ibid. § 139). The Court finds that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition.[68]

This was meant to reinforce the point that in assessing the risk of prohibited treatment in the receiving country, the Court was prevented from taking into account the 'demands of the general interest of the community'[69] or the need for suspected offenders to be brought to justice.[70] The Court confirmed that *Soering* was, to this extent, no longer good law:

> [I]n the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the *Soering* judgment.[71]

The conclusion thus appeared largely straightforward. The *Chahal* ruling, as reaffirmed in *Saadi*, must be considered to apply equally to all persons under the jurisdiction of a Contracting State and without distinction between the proscribed forms of ill-treatment.[72] So far, so good. Yet, immediately after reaching this conclusion and apparently setting aside the 'relativist' approach of the majority of the House of Lords, the Court's line of argument unravelled without any apparent reason.

Up to paragraph 176, *Ahmad* could be read as a robust defence of the ECtHR's jurisprudence on *non-refoulement* against recent misconceptions. Immediately afterwards, however, the Court inexplicably set out to undo much of its defence in a paragraph worth quoting in full:

> 1. However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States [citation omitted]. *This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case*. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to

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[68] *Ahmad*, [172].
[69] *Soering*, n 7 above, [89].
[70] ibid, [89] and [110].
[71] *Ahmad*, [173].
[72] *Ahmad*, [176]. As to the question of being 'within the jurisdiction' of a Contracting State, see *Hirsi Jamaa and others v Italy* App No 27765/09, Judgment of 23 February 2012; *Al Saadoon and Mufdhi v UK* (2010) 51 EHRR 9; *Al-Skeini and others v UK* (2011) 53 EHRR 18.

> find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context [citation omitted].[73]

The statement emphasised above constitutes a curious new development in Article 3 case law, which had made its first appearance in another judgment of the Fourth Section of the Court, *Harkins and Edwards v UK*.[74] It suggests that Article 3 means something else – something less, in fact! – when the context is one of expulsion to a non-ECHR State, whether by extradition or otherwise.

The underlying reason for this pronouncement is unclear – it may be that the Court was concerned with clarifying the minimum threshold of application of Article 3. The Court outlined the factors that had so far been relevant in engaging Article 3, including duration, intention to humiliate or debase and 'a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'.[75] These factors, the Court added, depended closely on the facts and 'so will not be readily established prospectively in an extradition or expulsion context'.[76] The Court then concluded by stating, in a factual manner but with clear normative overtones, that 'it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention' and that, 'save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law',[77] referring evidently to the USA.[78] Indeed, it did not make such finding in this case. In a dubious twist of cultural relativism, the Court appeared to state without qualms that treatment amounting to torture or to inhuman or degrading treatment or punishment in an ECHR State may not be contrary to Article 3, that is, *not* amount to torture or inhuman or degrading treatment or punishment, in a non-ECHR State, such as the USA.[79]

A DANGEROUS METHOD

If the Court really wished to address concerns created by its own sometimes ambiguous construction of the minimum threshold of Article 3 ECHR,[80] it chose the wrong method to do so. There are three reasons in particular why paragraph 177 of *Ahmad* is highly problematic. First, as a matter of logic, the construction adopted is at odds with the absolute nature of Article 3 because it asserts that the Article might mean something in Europe and something else in Colorado. As outlined above, the absolute nature of Article 3 ECHR lies in three key elements: it admits of

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[73] *Ahmad*, [177] (emphasis added).
[74] *Harkins and Edwards v UK* App Nos 9146/07 and 32650/07, Judgment of 17 January 2012, [129].
[75] *Ahmad*, [178].
[76] ibid.
[77] ibid, [179].
[78] There is arguably room for comparison here with the presumption of 'equivalent protection' put forth in the *Bosphorus* judgment of the ECtHR regarding EC (now EU) acts, which can be rebutted only by showing that the protection of Convention rights is 'manifestly deficient'. See *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1, especially [154]-[157].
[79] *Ahmad*, [179].
[80] See eg Addo and Grief, n 26 above; Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR', (2003) 21 *Neth. Q. Hum. Rts.* 385; A. Fabbricotti, 'The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases', (1998) 10 *Int'l J. Refugee L.* (1998) 637.

no qualifications or exceptions; it cannot be subject to derogation under Article 15 ECHR; and it applies to everyone no matter what.[81] In an expulsion context, the Grand Chamber has affirmed that '[s]ince protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule.'[82] Yet what is the Court doing by placing certain acts or omissions of the State *within* the protection of Article 3 in a domestic context but outside it in an expulsion context if not engaging in an internal – and insidious – displacement of this absolute protection and creating acceptable 'derogations'?

Second, the statement undermines the universality of the prohibition of torture and inhuman and degrading treatment and punishment, which goes well beyond the confines of the European Convention on Human Rights and also binds the US government.[83] The Court appears to suggest that it has rarely found and, by implication, would only rarely find a real risk of violation of Article 3 if an applicant were to be removed to 'a State which had a long history of respect of democracy, human rights and the rule of law'.[84] Aside from its indefensible cultural implications, the statement that caution should be exercised when 'good' countries are concerned, compared to 'bad' countries, is all the more problematic given the last decade of human rights policies of the US government on counter-terrorism (Guantánamo and extra-ordinary renditions being two points of reference).[85] Instead of performing its admittedly difficult task of interpreting and applying the terms contained in Article 3 ECHR, the Court suggested that the threshold can depend on the cultural and political affinity of the receiving country with 'European' values of 'democracy, human rights and the rule of law'. These are very unfortunate words. As the annual reports of Amnesty International and other NGOs show, no government anywhere in the world can claim to be a paragon of virtue as regards human rights, and it is certainly inappropriate for a Section of the Strasbourg Court to resume the untenable distinction between what appears to be the equivalent of 'civilised' and 'uncivilised' countries.[86] In fact, Article 3 of the Convention Against

[81] See *Ireland v UK*, n 20 above, at [163].
[82] *Saadi*, n 5 above, [138].
[83] See Article 3, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85; see also D. Kretzmer, 'The Prohibition of Torture', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008-, online edition), available at www.mpepil.com [last accessed 24 July 2012]. The existence of a customary international law prohibition of torture was recently affirmed by the ICJ in *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, International Court of Justice, 30 November 2010, 50 ILM 37 (2011), [87].
[84] *Ahmad*, [179].
[85] The literature on the topic is vast; see inter alia D. Cole (ed), *The Torture Memos: Rationalising the Unthinkable* (New York: The New Press, 2009); L. N. Sadat, 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror' (2006-2007) 75 *Geo Wash L Rev* 1200; John T Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees' (2005) (6) *Melbourne Journal of International Law*, 516-533, 525; F. De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: Cambridge University Press, 2011); K.J. Greenberg and J. L. Dratel (eds), *The torture papers: the road to Abu Ghraib* (New York: Cambridge University Press, 2005); R. K. Goldman, 'Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture,' (2004) 12(1) *Hum Rts Brief* 1.
[86] See Article 38(1)(c) of the Statute of the International Court of Justice for the now inoperative vestiges of such a distinction.

Torture specifically invites authorities (and Courts) to 'take into account all relevant considerations including, where applicable, the existence in the [receiving] State … of a consistent pattern of gross, flagrant or mass violations of human rights' when assessing cases of *non-refoulement*. Such an assessment must be based on the human rights record of the country in question, not on its cultural and political affinity with the sending country.

Lastly, it is true that deciding whether a particular treatment or punishment triggers the Article 3 threshold is necessarily a question of fact to be evaluated in its context.[87] Yet the ease with which the Court accepts certain implications of this fact-sensitive approach in a *refoulement* context is disturbing. Effectively, the Court posits that the protection in Article 3 may be absolute, but the assessment of whether it has been breached must predominantly be *ex post facto*, that is, after an individual actually does suffer what he or she is absolutely entitled *not* to suffer. According to the Court in *Ahmad*, the risk of proscribed treatment will not be easily established *ex ante* in an expulsion context. Based on this, it opted to err on the side of expulsion. The preventive function of human rights, notably of absolute rights, and the underlying basis of the preventive scope of *non-refoulement* are bypassed. *Non-refoulement* obligations exist to avert the suffering of irreparable harm[88] and to render the guarantee in Article 3 'practical and effective and not theoretical and illusory'.[89] All these fundamental considerations were lost in a few unfortunate lines in *Ahmad*. The Grand Chamber will hopefully set the record straight.[90]

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[87] See discussion above.

[88] *Soering*, n 7 above, [90]. See also Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, para 12 and General Comment No. 31, Nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. HRI/GEN/1/ Rev.1, 28 July 1994, p. 31, [9].

89 See *Hirsi Jamaa* (n 72 above), [175]; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, [101], [121] and [125].

[90] At the time of writing, the panel of the Grand Chamber has not yet decided whether it will accept the referral of the case (a decision is expected in early September 2012).