

European *non-Refoulement* Revisited

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1 Legal Developments and Challenges

Protection against *refoulement* has become a well-established practice under international human rights norms prohibiting torture and other forms of cruel, inhuman or degrading treatment or punishment.¹ In this manner human rights treaties have become an important supplement to the *non-refoulement* principle laid down in Article 33 of the UN Refugee Convention.² At the European level, this interpretation of Article 3 of the European Convention on Human Rights,³ as developed by the European Commission of Human Rights, was confirmed by the European Court of Human Rights in the *Soering* judgment in 1989, dealing with the issue of extradition of an offender who was likely to be exposed to inhuman treatment after his prospective conviction in the requesting non-European State.⁴

Subsequent judgments clarified the scope of this protection as well as its absolute nature, in that the European Court of Human Rights held the prohibition of *refoulement* applicable not only to cases concerning extradition, but also to decisions to expel aliens applying for asylum in a Convention State⁵ and other aliens who are considered undesirable in the territory.⁶ The Court's reasoning behind this extension of the scope of applicability of Article 3 was presented in the following, now rather classical, wording:

“In its *Soering* judgment of 7 July 1989 the Court held that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if

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- 1 Cf. Plender, Richard and Nuala Mole, *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, in Nicholson, Frances and Patrick Twomey (eds.), *Refugee Rights and Realities. Evolving International Concepts and Regimes*, Cambridge University Press, Cambridge 1999, pp. 81-105; Lambert, Helene, *Protection Against Refoulement from Europe. Human Rights Law Comes to the Rescue*, *International and Comparative Law Quarterly* 1999, p. 515-44.
 - 2 Convention relating to the Status of Refugees, 28 July 1951, UNTS Vol. 189 No. 2545, amended by the Protocol relating to the Status of Refugees, 31 January 1967, UNTS Vol. 606 No. 8791 (hereinafter: Refugee Convention).
 - 3 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 5, most recently amended by Protocol No. 14bis, 27 May 2009, CETS No. 204 (hereinafter: ECHR).
 - 4 *Soering v. United Kingdom*, ECtHR judgment of 7 July 1989 (Series A 161).
 - 5 *Cruz Varas and Others v. Sweden*, ECtHR judgment of 20 March 1991 (Series A 201), and *Vilvarajah and Others v. United Kingdom*, ECtHR judgment of 30 October 1991 (Series A 215). This development was foreseen by Einarsen's concluding remark on the *Soering* judgment: “There is thus an *implied right* to freedom from exposure to torture or to inhuman treatment or punishment in the receiving State under the Convention, a right which might be applicable in asylum or deportation cases as well as in extradition cases.” Cf. Einarsen, Terje, *The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum*, *International Journal of Refugee Law* 1990, pp. 361-89 (p. 366-67).
 - 6 *Chahal v. United Kingdom*, ECtHR judgment of 15 November 1996, and *Ahmed v. Austria*, ECtHR judgment of 17 December 1996.

extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country...

Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment...

Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and *a fortiori* to cases of actual expulsion.”⁷

In the *Vilvarajah* judgment, the Court set out observing that Contracting States “have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens... Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols.”⁸ Nonetheless, the Court upheld the principle that “[E]xpulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.”⁹

Since these developments in the Strasbourg case law, various questions have been raised as to the precise scope and content of this protection under ECHR Article 3. Against the background of the interpretation pronounced in judgments from the European Court of Human Rights in recent years, some of the most important questions shall be discussed in this article with a view to clarifying the criteria for the application of Article 3 in cases concerning the protection against *refoulement*. More specifically, the discussion will include the reconsideration of the absolute nature of the protection under Article 3 (Section 2 below), and the question of possible requirements of “individualisation” of the risk of ill-treatment; since EU harmonisation of asylum law reflects the potential interaction with the ECHR, certain aspects of the evolving EU law in this area will be included into the discussion (Section 3). Finally, some other important developments in the ECHR interpretation shall be mentioned in order to draw a conclusion on the state of law under Article 3 (Section 4).

7 *Cruz Varas and Others v. Sweden*, ECtHR judgment of 20 March 1991, paras. 69-70.

8 *Vilvarajah and Others v. United Kingdom*, ECtHR judgment of 30 October 1991, para. 102.

9 *Ibid.*, para. 103.

2 The Absolute Nature of Article 3

Basing itself on the absolute nature of the protection under Article 3 ECHR, the Court has held that protection against *refoulement* can be invoked by everyone, irrespective of his or her conduct in the State wanting to expel or deport the person. This was first pronounced in the *Chahal* case, where the British Government claimed an implied limitation to Article 3 entitling Contracting States to expel an alien to a receiving State even where a real risk of ill-treatment existed if such removal was required on national security grounds. In the alternative, it was argued that the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3, taking into account that there are varying degrees of risk of ill-treatment.

The Court rejected this reasoning, reiterating that Article 3 enshrines one of the most fundamental values of democratic society and that, despite the “immense difficulties faced by States in modern times in protecting their communities from terrorist violence”, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.¹⁰ Consequently, the Court stated:

“The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.”¹¹

Shortly after, the Court confirmed this interpretation of Article 3 in a case concerning the expulsion of a refugee following his conviction of civil crime.¹² Although this position could be considered established Strasbourg case law, it has indeed been challenged in the light of the increased threat of terrorist activities in the aftermath of the 11 September 2001 attacks in the USA and the terrorist bombings in Madrid on 11 March 2004 and in London on 7 July 2005.

An interesting example in that regard is the *Ramzy* case that was lodged against the Netherlands in 2005 by an Algerian citizen being subject to an expulsion order due to his suspected involvement in terrorist activities. Here the respondent Government acknowledged, and did not want to challenge the absolute nature of ECHR Article 3.¹³ Insisting on the undeniable interest in the

10 *Chahal v. United Kingdom*, ECtHR judgment of 15 November 1996, paras. 76 and 79, referring to *Soering v. United Kingdom*, ECtHR judgment of 7 July 1989, para. 88.

11 *Ibid.*, para. 80.

12 *Ahmed v. Austria*, ECtHR judgment of 17 December 1996.

13 *Ramzy v. Netherlands*, ECtHR decision of 27 May 2008, para. 100.

applicant's expulsion, the Netherlands instead underlined the need to "adhere strictly to the criterion laid down by the Court that an applicant must submit evidence that he or she *personally* has a well-founded fear of being subjected to treatment contrary to Article 3". The Government stated that adhering strictly to this burden of proof was all the more important in cases where national security interests were at stake, as in such cases the positive obligation of Contracting States under ECHR Article 2 to take all reasonable preventive action to protect its residents from life-threatening situations also came into play.¹⁴

In the same case, on the other hand, four Governments intervened in order to have the Court "alter and clarify" the approach followed in *refoulement* cases under Article 3 concerning the threat created by international terrorism. The intervening Governments argued the need to reconsider the Court's principle that in view of the absolute nature of Article 3, the risk of treatment contrary to this provision could not be weighed against the reasons put forward by a State to justify expulsion, including the protection of national security. Because of its "rigidity" that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures.¹⁵ More specifically, the intervening Governments held that, while it was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 was absolute, in the event of expulsion, the treatment would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then, according to the interveners, bound by a "positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole."¹⁶ Therefore, the threat presented by the deportee should be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment, making it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 against those secured to all other members of the community by Article 2. Secondly, national-security considerations should influence the standard of proof required from the applicant who should prove that it was "more likely than not" that he would be subjected to treatment prohibited by Article 3.¹⁷

The application by *Ramzy* was declared admissible by the Court, but the judgment has not yet been delivered.¹⁸ In the meantime, however, the arguments of the intervening Governments have been essentially rejected by the Grand Chamber of the Court in its judgment in another case in which the British Government had intervened and presented legal views similar to those advanced in the *Ramzy* case. In this case, the Tunisian applicant *Saadi* had been prosecuted

14 *Ibid.*, paras. 104-05.

15 *Ibid.*, paras. 125 and 130 (the Governments of Lithuania, Portugal, Slovakia and the United Kingdom).

16 *Ibid.*, para. 128.

17 *Ibid.*, para. 122.

18 *Ibid.*, para. 141. Cf. cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=38249920&skin=hudoc-en&action=request (28. November 2009).

in Italy for involvement in international terrorism, and convicted for parts of the charges, resulting in an order for deportation to Tunisia, where he had been sentenced *in absentia* to twenty years of imprisonment for membership of a terrorist organisation and for incitement to terrorism.

Having restated the general principles of States' responsibility in the event of expulsion – including the absolute prohibition under ECHR Article 3, irrespective of the victim's conduct – the Court noted “first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence... It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.”¹⁹ The Court then took issue with the line of reasoning suggested by the intervening British Government:

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

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

With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national

¹⁹ *Saadi v. Italy*, ECtHR judgment of 28 February 2008, para. 137.

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

The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.”²⁰

The principled position here pronounced by the Court towards the challenges to the absolute nature of ECHR Article 3 has been reiterated in subsequent judgments.²¹ Thus, it seems beyond doubt that the Court has not been prepared to modify the absolute protection against *refoulement* under Article 3 despite the strong assertions of national security considerations that have been presented by some European States.²²

3 Requirement of “Individualised” Risk?

3.1 The Notion of “Special Distinguishing Features”

It has been subject to considerable discussion whether the protection against *refoulement* under ECHR Article 3 requires that the asylum applicant has demonstrated that he or she will be exposed to an *individualised* or *particularised* risk of treatment contrary to this provision upon expulsion. The answer to this question, as well as the degree of such “individualisation” and the means of evidence necessary if such a requirement exists, may be decisive as to whether ECHR Article 3 in reality provides an additional scope of protection as compared to *non-refoulement* under Article 33 of the UN Refugee Convention.

In the context of the Refugee Convention, a similar interpretive problem has occurred due to the understanding in certain States of the specific Convention grounds of persecution so as to imply a requirement of “individualisation” of the risk of persecutory measures. This may indeed be considered a misperception of

²⁰ *Ibid.*, paras. 138-41.

²¹ See, e.g., *Muminov v. Russia*, ECtHR judgment of 11 December 2008, para. 89; *Ben Khemais c. Italie*, ECtHR judgment of 24 February 2009, para. 53; *Abdolkhani and Karimnia v. Turkey*, ECtHR judgment of 22 September 2009, para. 91.

²² Cf. Moeckli, Daniel, Saadi v. Italy: *The Rules of the Game Have Not Changed*, Human Rights Law Review 2008, p. 534-48.

the refugee definition in Article 1 A (2) of the Refugee Convention, according to which the decisive issue is the individual's risk of being personally exposed to measures of persecution on return to the country of origin, and whether he or she is exposed to a *differential risk* due to such individual characteristics as those expressed in the Convention's persecution grounds.²³ Nonetheless, understandings at variance with this interpretation have resulted in various forms of so-called "singling out" criteria being applied in those States' practices for determining refugee status under the Convention.²⁴

The discussion of the possible "individualisation" requirement in ECHR Article 3 has frequently made reference to certain parts of the legal reasoning of the European Court of Human Rights in the *Vilvarajah* judgment. It was here stated that the evidence before the Court concerning the background of the applicants, as well as the general situation in Sri Lanka, did not "establish that their personal position was *any worse than the generality of other members* of the Tamil community or other young male Tamils who were returning to their country", and that "there existed *no special distinguishing features* in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way."²⁵ It is, however, questionable whether this passage should be understood as implying a general requirement of "special distinguishing features" – more or less in line with the "singling out" criteria mentioned above in connection with the Refugee Convention – in order for an applicant to be eligible for protection under Article 3. In this respect, it could be noted that such an interpretation would be rather difficult to reconcile with the Court's general approach to protection against *refoulement* under the Article, not least the emphasis put on the absolute nature of the prohibition of ill-treatment.²⁶

Importantly, the Court referred to the absence of "special distinguishing features" in connection with its consideration of the evidence before the Court concerning the background of the applicants, as well as the general situation. While the situation was still unsettled and "there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants", the Court emphasised that "[a] *mere possibility* of ill-treatment, however, in such circumstances, is *not in itself sufficient* to give

23 Cf. Grahl-Madsen, Atle, *The Status of Refugees in International Law*, Vol. I, Sijthoff, Amsterdam 1966, p. 213; Hathaway, James C., *The Law of Refugee Status*, Butterworths, Toronto – Vancouver 1991, pp. 90-97; Goodwin-Gill, Guy S. and Jane McAdam, *The Refugee in International Law*, Third Edition, Oxford University Press, Oxford 2007, p. 126-30.

24 See on past practices in Norway, Einarsen, Terje, *Retten til vern som flyktning*, Cicero Publisher, Bergen 2000, pp. 409-12 and p. 436; on parts of Danish practices, Vedsted-Hansen, Jens, "Konkret og individuelt" – *Et kriteriums forvandling fra kvalifikation til eksklusion*, in Jurist uden omsvøb. Festskrift til Gorm Toftegaard Nielsen, Christian Ejlers' Forlag, Copenhagen 2007, pp. 599-616; more generally, see Lassen, Nina, *Flygtningekonventionen og udlændingelovens flygtningebegreber*, in Christensen, L. B. *et al.*, *Udlændingeret*, 3. edition, DJØF Publishers, Copenhagen 2006, pp. 326-70.

25 *Vilvarajah and Others v. United Kingdom*, ECtHR judgment of 30 October 1991, paras. 111-12 (italics added).

26 Cf. Vedsted-Hansen, Jens, *Torturforbud som udsendelsesbegrænsning: non refoulement-virkningen af EMRK artikel 3*, EU-ret & Menneskeret 1998, pp. 49-57 (p. 53).

rise to a breach of Article 3.”²⁷ Concluding that there had been no violation of Article 3, the Court stated: “In the light of these considerations the Court finds that *substantial grounds* have not been established for believing that the applicants would be exposed to a *real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 3 on their return to Sri Lanka in February 1988.”²⁸

Thus, the context points towards the conclusion that the Court’s reasoning reflected the concrete assessment of the evidence that had been available to the British authorities at the time of expelling the applicants to Sri Lanka, rather than abstract interpretation of Article 3 that would be limiting its scope of application to circumstances with “special distinguishing features” pertaining to the individual applicant’s risk of ill-treatment upon expulsion. This understanding of the criteria for protection against *refoulement* under ECHR Article 3 has been confirmed in more recent Strasbourg case law.

3.2 *Personal Circumstances and General Situations*

The Court’s interpretive clarification took place, first and foremost, in the *Salah Sheekh* judgment from 2007, and subsequent judgments have restated and further elaborated the interpretation here pronounced. In this case the applicant was held by the Court to be protected against expulsion to “relatively safe” areas in Somalia because there was a real chance that return to such an area would result in his further removal to unsafe areas of the country, so that no “internal flight alternative” was available.²⁹ As regards the latter areas, the respondent Government were of the opinion that the problems likely to face the applicant were to be seen as a consequence of the *general unstable situation* in which criminal gangs frequently, but *arbitrarily*, intimidated and threatened people.

In the Court’s view, this was insufficient to remove the treatment from the scope of Article 3, as the existence of the obligation not to expel is not dependent on whether the source of the risk of ill-treatment stems from factors involving the direct or indirect responsibility of the authorities of the receiving country, and Article 3 may also apply in situations where the danger emanates from persons or groups of persons not being public officials. Following these observations, the Court explicitly addressed the meaning of the “special distinguishing features” criterion as applied in the *Vilvarajah* case:

“The Court would further take issue with the national authorities’ assessment that the treatment to which the applicant was subjected was meted out *arbitrarily*. It appears from the applicant’s account that he and his family were targeted because they belonged to a *minority* and for that reason it was known that they had *no means of protection*; they were easy prey, as were the other three Ashraf families living in the same village... The Court would add that, in its opinion, the

27 *Vilvarajah and Others v. United Kingdom*, ECtHR judgment of 30 October 1991, para. 111 (italics added).

28 *Ibid.*, para. 115 (italics added).

29 *Salah Sheekh v. Netherlands*, ECtHR judgment of 11 January 2007, paras. 138-44. On the issue of “internal flight alternative”, see also *Hilal v. United Kingdom*, ECtHR judgment of 6 March 2001.

applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk. In this context it is true that a mere possibility of ill-treatment is insufficient to give rise to a breach of Article 3. Such a situation arose in the case of *Vilvarajah and Others v. the United Kingdom*, where the Court found that the possibility of detention and ill-treatment existed in respect of young male Tamils returning to Sri Lanka. The Court then insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (judgment cited above, p. 37, §§ 111-112). However, in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that on his return the applicant would be exposed to treatment in breach of Article 3. It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed –, the applicant were required to show the existence of further special distinguishing features."³⁰

Given the fact that *Vilvarajah* has frequently been understood as based on an "individualisation" requirement, this reasoning might be seen as an expression of reinterpreting Article 3. On the other hand, the quoted passage merely appears to be the Court's explanation of its previously applied criteria, rather than a change of direction in that regard, and the wording is significantly different from instances where the Court deliberately adopts an interpretation differing from the established case law.³¹ Furthermore, it should be noted that the Netherlands Government requested to have the *Salah Sheekh* case referred to the Court's Grand Chamber which, however, rejected the referral under ECHR Article 43 (2).³² This may suggest that the Court itself did not consider the Chamber judgment as being of a principled nature, as would seem to be the case if this had been an instance of reinterpretation of Article 3.

In the absence of a requirement of "special distinguishing features" as an interpretive *conditio sine qua non* to protection under Article 3, the question can be raised whether the impact of the personal circumstances of the asylum applicant has essentially diminished, or such circumstances have even become irrelevant to the *non-refoulement* decision. This is indeed not the state of law, as it appears from subsequent case law restating the interpretation quoted above. Perhaps most notably, the Court has explained that the foreseeable consequences of removal of an asylum applicant must be assessed in the light of the general situation in the country of destination as well as the applicant's personal circumstances. In this connection, and "where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination." Yet, "a general situation of violence will not normally in

³⁰ *Ibid.*, para. 148 (italics added).

³¹ See, e.g., *Christine Goodwin v. United Kingdom*, ECtHR judgment of 11 July 2002, para. 74.

³² ECtHR, Press release issued by the Registrar, No. 488 of 6 July 2007, p. 4.

itself entail a violation of Article 3 in the event of an expulsion”, and the Court has “rarely found a violation of Article 3 on that ground alone.”³³

The relevant criteria for protection against *refoulement* under Article 3 were then spelled out by the Court’s reference to various situations in which the foreseeability of ill-treatment upon expulsion will have to be determined by the assessment of different kinds of evidence. Depending on the situation, that assessment will focus differently on the general situation and the applicant’s personal circumstances:

“From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a *general situation of violence* in a country of destination will be of a *sufficient level of intensity* as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach *only in the most extreme cases of general violence*, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group *systematically exposed to a practice of ill-treatment*, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the *existence of the practice* in question and his or her *membership of the group* concerned... In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant’s account and the information on the situation in the country of destination in respect of the group in question...

In determining whether it should or should not insist on *further special distinguishing features*, it follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question...”³⁴

Against this background, it can be concluded that the criteria for applying Article 3 relate primarily to the concrete assessment of evidence, while the existence of “special distinguishing feature” is not a general condition that has been pre-determined by way of abstract interpretation of the Article.³⁵ The relevant focus of the assessment varies significantly between (1) *extreme* cases of general violence; (2) *exceptional* situations where members of a minority or other group will be personally at risk due to their membership of that group, in particular if the general situation makes it likely that such members are systematically exposed to a practice of ill-treatment; and (3) the more ordinary cases in which it will appear appropriate to insist on the applicant’s provision of

33 *NA. v. United Kingdom*, ECtHR judgment of 17 July 2008, paras. 113-14.

34 *Ibid.*, paras. 115-17 (italics added).

35 Cf. Storgaard, Louise Halleskov, *EMRK artikel 3: Konkretisering vs. individualisering af risiko i asylsager*, EU-ret & Menneskeret 2009, p. 234-43.

evidence showing special features distinguishing him or her from persons who are at an insufficient level of risk in the relevant country of destination.³⁶

3.3 *EU Asylum Law – Contribution or Competition?*

As part of the harmonisation of asylum law, the EU has adopted common standards both for the recognition and content of refugee status and for granting subsidiary protection to third country nationals in need of international protection beyond the scope of the Refugee Convention.³⁷ The delimitation of the beneficiaries of the latter form of protection is partly based on Member States' *non-refoulement* obligations under the ECHR, in that the Qualification Directive requires applicants for subsidiary protection to be facing a real risk of suffering serious harm. The Directive defines such serious harm as (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³⁸

Since the first two types of harm have clearly been defined in line with ECHR Protocol 6 Article 1, and Article 3, respectively, the interpretation of these parts of the Directive will be directly guided by the relevant Strasbourg case law. To the contrary, Article 15 (c) of the Directive has no parallel in the ECHR, and it seems quite clear that this provision is meant to extend the scope of subsidiary protection beyond the ECHR obligations.³⁹ This has been confirmed by the European Court of Justice in a judgment that not only clarifies the distinction between the ECHR sources of the Directive and the specific EU asylum standard in Article 15 (c), which is different from ECHR Article 3 and must therefore be interpreted independently.⁴⁰ In addition, by its interpretation of this provision the judgment may have the potential of informing the understanding of the requirement of "individualised" risk also in the context of ECHR Article 3; for that reason the ECJ judgment shall be briefly discussed in the following.

36 *See, e.g., Saadi v. Italy*, ECtHR judgment of 28 February 2008, para. 132; *Muminov v. Russia*, ECtHR judgment of 11 December 2008, para. 95; *F.H. v. Sweden*, ECtHR judgment of 20 January 2009, paras. 90-93.

37 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, OJ 2004 L 304/12 (hereinafter: Qualification Directive).

38 Qualification Directive Article 15, *cf.* Article 2 (e).

39 *Cf.* recital 25 of the preamble of the Qualification Directive: "It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments *and practices existing in Member States*" (italics added).

40 *Elgafaji and Elgafaji v. Staatssecretaris van Justitie*, ECJ judgment of 17 February 2009 in case C-465/07, para. 28; the independent meaning of Article 15 (c) is not contradicted by para. 44 of the judgment which must be seen as merely reflecting the ECJ's check of the compatibility of its interpretation with the ECHR.

Thus, in its interpretation of Article 15 (c) of the Directive, the ECJ discusses whether the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that the applicant can adduce evidence that he is *specifically targeted* by reason of factors *particular to his circumstances*. By way of comparing the three types of serious harm defined in Article 15, the ECJ considers Article 15 (a) and (b) as covering situations in which the applicant is “specifically exposed to the risk of a particular type of harm”.⁴¹ This may suggest two different aspects of meanings of “individualisation”, the first one implying *particularised risk* due to circumstances particular to the individual applicant; the other aspect referring to the *particular form* of serious harm such as that defined in Article 15 (a) and (b).

As regards Article 15 (c), the ECJ concludes that the word “individual” must be understood as covering harm to civilians *irrespective of their identity* where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15 (c) of the Directive.⁴² While this interpretation is considered likely to ensure that the provision has its own field of application, the ECJ at the same time states that the objective finding of a risk merely linked to the general situation is not, as a rule, sufficient to establish that the conditions in Article 15 (c) have been met in respect of a specific person. However, the Directive is held to allow for “the possibility of an *exceptional* situation which would be characterised by such a high degree of risk that... that person would be subject *individually* to the risk in question.”⁴³

The ECJ observations on “individualisation” are formally irrelevant to the discussion of the criteria for protection against *refoulement* under ECHR Article 3, since the judgment makes it clear that Article 15 (c) of the Directive differs from the ECHR and must be interpreted independently. Nonetheless, the ECJ alludes to interpretation of the ECHR when it continues by considering the “broad logic” of Article 15 of the Directive; in that connection it states that the harm defined in Article 15 (a) and (b) requires a “clear degree of individualisation”.⁴⁴ This might be discarded as reflecting an incorrect understanding of the interpretation of ECHR Article 3 in the Strasbourg case law. On the other hand, in the light of the passages of the judgment quoted above it is not entirely clear to which form of “individualisation” the ECJ is actually referring. As the meaning of this term does not seem to have been specifically clarified in the judgment, it may be understood either as a reference to particular types of harm; or as alluding to the assessment of evidence pertaining to the individual’s exposure to risk, in the same manner as the notion of “special distinguishing features” in the context of ECHR Article 3, as discussed above (Section 3.2).

41 *Ibid.*, paras. 30-32.

42 *Ibid.*, para. 35.

43 *Ibid.* para. 37 (italics added).

44 *Ibid.*, para. 38.

The latter understanding may be confirmed by the subsequent passage of the judgment, in which it is stated that “the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.” This statement is followed by the ECJ’s further references to Article 4 of the Qualification Directive, explicitly dealing with the assessment of “facts and circumstances”.⁴⁵ Thus, it seems safe to conclude that the ECJ has not implicitly (re)introduced an abstract interpretation of ECHR Article 3 which would hardly be compatible with, at least, the most recent judgments from the European Court of Human Rights.

4 Concluding on the Protection Against *Refoulement*

The developments of the Strasbourg case law discussed above reflect the significant role of ECHR Article 3, as well as the enhanced institutional role of the European Court of Human Rights, in the protection against *refoulement* from European States. While the Court has been able to uphold the core principles of protection, despite certain States’ attempts to challenge some of those principles, it has at the same time demonstrated its awareness of the limits of interpretive development of the scope of protection obligations in this area. Other aspects of the legal developments under the ECHR have further contributed to the relatively increased importance of this human rights treaty-based protection of asylum applicants supplementing the UN Refugee Convention. While these cannot be fully described and analysed within the framework of this article, it is worthwhile mentioning a few areas of asylum law in which particularly important interpretive developments have taken place, affecting crucial substantive and procedural aspects of the protection against *refoulement*.

As regards the substantive delimitation of the scope of protection under Article 3, the Court has upheld its high threshold concerning removal of aliens suffering from serious *mental or physical illness* to a country where the facilities for medical treatment are inferior to those available in European States; such decisions may raise issues under Article 3, yet only in very exceptional cases where the humanitarian grounds against removal are compelling; the fact that the applicant’s circumstances, including life expectancy, would be significantly reduced is in itself insufficient to give rise to a violation of Article 3.⁴⁶ In terms of the *evidentiary* basis of the assessment of the general situation in countries of destination in cases concerning the protection against alleged *refoulement* under Article 3, the Court has confirmed the high impact of independent sources of information such as the UNHCR, while at the same time emphasising that

45 *Ibid.*, paras. 39-41; these parts of the judgment may seem to be inspired by the observations on the burden and level of proof in the opinion of 9 September 2008 of Advocate General Poiares Maduro, paras. 36-37.

46 *D. v. United Kingdom*, ECtHR judgment of 2 May 1997; *N. v. United Kingdom*, ECtHR judgment of 27 May 2008. Cf. Storgaard, Louise Halleskov, *Artikel 3 i Den Europæiske Menneskerettighedskonvention og udsendelse af udlændinge med helbredsproblemer*, EU-ret & Menneskeret 2008, p. 187-99.

certain statements from international organisations have limited or no direct relevance to the criteria for protection under Article 3.⁴⁷

Also the impact of the ECHR on procedural issues pertaining to the examination of asylum applications has been clarified in recent Strasbourg case law. Most importantly, the Court has interpreted ECHR Article 13 taken together with Article 3 so as to impose on States an obligation to secure the right to *suspensive effect* of domestic appeals against negative decisions on asylum applications.⁴⁸ In addition, the Court has changed its earlier interpretation concerning the binding effect of *interim measures* under Rule 39 of the Court's Rules of Procedure with a view to suspending removal from the responding State during the proceedings before the Court, implying that non-adherence by the State is now considered a violation of the individual right of application to the Court under ECHR Article 34.⁴⁹

The EU harmonisation of asylum law, and the emerging interpretation of these EU standards by the European Court of Justice as discussed above (Section 3.3), might be seen as partly or gradually making the ECHR and the Strasbourg case law less relevant to the protection of applicants for asylum in Europe. In that regard it should, first of all, be recalled that a large number of Council of Europe States, parties to the ECHR, are not Member States of the EU; even EU Member States are not necessarily bound by the asylum standards that have been adopted. In addition, and not less importantly, both the legislative adoption and the judicial interpretation of the EU standards will take place in the context of, and in dialogue with, legal developments in the Strasbourg case law. One of the challenges for the future European development of protection against *refoulement* will be the extent to which the EU will maintain standards going beyond the ECHR obligations of Member States. If they do so, another one may be the extent to which such protection standards become absorbed by the evolving interpretation of the ECHR.

47 *NA. v. United Kingdom*, ECtHR judgment of 17 July 2008, paras. 118-22; this position was restated in *F.H. v. Sweden*, ECtHR judgment of 20 January 2009, yet the concrete assessment of the situation in the latter case would seem to have limited general impact.

48 *Gebremedhin c. France*, ECtHR judgment of 26 April 2007. See also Committee of Ministers of the Council of Europe, Recommendation R (98) 13 on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 13 of the European Convention on Human Rights, 18 September 1998.

49 *Mamatkulov and Askarov v. Turkey*, ECtHR judgment of 4 February 2005; the opposite interpretation was adopted by the majority of the Court in *Cruz Varas and Others v. Sweden*, ECtHR judgment of 20 March 1991.