A CRITIQUE OF THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN *IRELAND V UNITED KINGDOM*, AND ITS EFFECT ON ARTICLE 3 JURISPRUDENCE

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ABSTRACT

Article 3 of the European Convention on Human Rights ostensibly provides absolute protection against torture and inhuman or degrading treatment or punishment. Despite what the Court says, this protection is not unqualified. Article 3 now embodies a two-tiered protection, with torture alone attracting a 'special stigma'. This hierarchical approach is traceable to the seminal decision of *Ireland v United Kingdom,* and Part A of this thesis demonstrates that it is deeply flawed. The hierarchy between torture and other forms of ill-treatment (the *Ireland* hierarchy) has become entrenched in the Court's case law. It continues to manifest in the Court's narrow definition of torture, and its expansive interpretation of inhuman and degrading treatment. This thesis argues that the growing breadth of the latter concept has occurred in tandem with, and may partly explain, the rapid increase in the number of Article 3 violations found by the Court each year. These developments have carried important consequences. There have been policy consequences for the member states in areas such as national security (where deportation of terrorist suspects is sought to be used as a policy tool) and prisoners' rights (where the proportionality of sentences, conditions of detention and administrative penalties within prisons, are all now subject to European supervision). In addition to the policy consequences, the expanding second tier of the *Ireland* hierarchy has carried legal consequences for the Court's conception of Article 3. It has compelled the Court to introduce limiting devices into its case law on inhuman and degrading treatment. The introduction of these limiting devices, into what is an ostensibly unqualified domain, challenges the position of Article 3 as an absolute right.

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Thank you to my supervisor, Liora Lazarus, who has been enormously supportive and also happens to be a font of knowledge. That is a very good combination, as I have discovered.

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INTRODUCTION

This thesis concerns the implications of the judge-made distinction between torture and other forms of ill-treatment. This distinction was created by the European Court of Human Rights ('the Court') in its case law, commencing with the seminal decision of *Ireland v United Kingdom*.[1] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention')[2] says that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,' and Article 15 of the Convention makes that provision non-derogable, even in a time of war or other grave emergency. During the drafting of the Convention, the British representative famously said that 'no cause whatever—not even the life of a wife, a mother or a child, the safety of an army or the security of a State—can justify [the] use or existence [of torture]'.[3] It is the impossibility of derogation, and the absence of any limitation clause, which has led the Court to

[1] *Ireland v United Kingdom* (1978) Series A, No 25 (Ireland).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms; Opened for signature November 4, 1950, 213 UNTS 221 (entered into force September 3, 1953).

[3] Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (Martinus Nijhoff 1975) ('ECHR Travaux') vol I, 40.

declare that Article 3 is cast 'in absolute terms'.[4] This thesis challenges the accuracy of that statement, arguing that the Court's Article 3 case law entrenches a two-tiered system of protection.

What is it about torture that renders it 'not only morally wrong but also morally perverted'?[5] One aspect of that perversion may be that torture 'puts the victim in the unavoidable position of betraying or colluding against himself' and thereby 'forcing the victim to experience herself as helpless yet complicit in her own violation'.[6] But beyond the suffering of the individual victim, torture corrodes the State. It represents a 'twofold denial of the human, both the particular human being hurt and the collective human present in the products of civilisation.'[7] It corrupts those who commit torture, and compromises the society that sanctions it. In Waldron's words, 'torture mestastasizes; it affects all aspects of a state's operation.'[8]

The drafters of the European Convention sought to condemn torture in the strongest possible words. But there are a number of difficulties that potentially undermine the 'absoluteness' of the right. It is difficult, if not impossible, to put the right beyond reach of all limitations. In fact, there are a range of practical problems with the notion of 'absolute' rights, including: the Court's discretion to decline

[4] *Ireland* (n 1) 58 [163] (the Court).

[5] Sussman, D, 'What's Wrong with Torture?' (2005) 33 *Philosophy & Public Affairs* 1, 4-5.

[6] ibid 24, 30.

[7] Scarry, E, *The Body in Pain: The Making and Unmaking of the World* (OUP, 1985) 43.

[8] Waldron, J, *Torture, Terror, and Trade-offs : Philosophy for the White House* (OUP, 2010) 5 (footnote omitted).

admissibility or jurisdiction;[9] the prospect of State non-compliance with interim orders issued pending a full hearing of the case;[10] the margin of appreciation accorded to states with respect to emergency situations, which may allow abuses to occur;[11] the possibility of States entering reservations to the Convention, including, perhaps, to Article 3;[12] the possibility of securing a diplomatic settlement in respect of an Article 3 claim;[13] and unequal access to the institutions of European justice.[14] Given these practical difficulties, the description of Article 3 as 'absolute' may be a rhetorical device rather than a precise legal claim.

[9] For discussion of this aspect, see Addo, MK, and N Grief, 'Some Practical Issues Affecting the Notion of Absolute Right in Article 3 ECHR' (1998) 23 *European Law Review* 17.

[10] See, e.g., *Cruz Varas v Sweden* (1992) 14 EHRR 1, where the applicant was expelled to Chile one day after his application was lodged under Article 3 and a mere few hours after interim orders had been issued. This was held not to breach Art 25(1) by the narrowest of majorities, a vote of 10 to 9 by the Court in Plenary. See also *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 (GC) where Turkey ignored the Court's issuance of a Rule 39 interim order to prevent the deportation of two Uzbeks. The Grand Chamber found that, notwithstanding this, there was no breach of Articles 3 or 6 in the extradition, although Turkey had breached Article 34 by failing to respect the Court's interim measures. See further *Al-Moayad v Germany* (2007) 44 EHRR SE22, where the applicant, a Yemeni national accused of involvement with Al-Qaeda was extradited to the US even though he had lodged a Rule 39 application with the Court at the time of the extradition.

[11] See, e.g., Gross, O, and F Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625.

[12] Article 57(1) of the Convention allows for reservations 'in respect of any particular provision of this Convention'. However it is arguable that a reservation to Article 3 would be incompatible with the object and purpose of the Convention, and therefore invalid pursuant to Article 19(c) of the Vienna Convention on the Law of Treaties (opened for signature May 23, 1969) 1155 UNTS 331 (entered into force January 27, 1980).

[13] Article 39 of the Convention requires the Court to strike out a case if a friendly settlement is effected.

[14] It has been argued that 'the Convention system remains biased towards men n many respects even if it is, on the face of it, gender neutral and open to women'; see Dembour, M-B, *Who Believes in Human Rights?: Reflections on the European Convention* (CUP, 2006) 9.

Despite these limitations and constraints, it is clear that Article 3 occupies a position of great importance in the hierarchy of Convention rights.[15] Human dignity is nowhere expressly mentioned in the Convention, but it is 'a concern which runs throughout' the Convention and which 'finds its clearest expression in Article 3'.[16] Time and again, the European Court has declared that Article 3 'enshrines one of the fundamental values of the democratic societies making up the Council of Europe.'[17]

The important position which Article 3 occupies in the Convention system finds an echo in the importance of the Convention system to the world at large. According to Emmerson, '[t]he European court has been, since its establishment, the most effective standard setting institution for human rights in the world'.[18] This is nowhere more true than in the law of torture. The jurisprudence of the Court was enormously influential in the drafting of the UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[19] as well as the drafting of other regional conventions such as the Inter-American

[15] Ashworth, A 'Security, Terrorism, and the Value of Human Rights', in Goold, BJ, and L Lazarus (eds) *Security and Human Rights* (Hart, 2007).

[16] Lawson, A, 'Disability, Degradation and Dignity: The Role of Article 3 of the European Convention on Human Rights' (2005) 56 *Northern Ireland Legal Quarterly* 462. See also Waldron, J, 'How Law Protects Dignity' [2012] *Cambridge Law Journal* 200.

[17] This has been repeated in almost every Article 3 judgment since *Soering v United Kingdom* (1989) 11 EHRR 439, [88] (Soering).

[18] Quoted in Judd, Terri, 'Ben Emmerson QC: The Bete Noire of the Right Wing Press with a "Leviathan Intellect"', The Independent, August 20, 2012, [http://www.independent.co.uk/news/people/profiles/ben-emmerson-qc-the-bte-noire-of-the-right-wing-press-with-a-leviathan-intellect-8061507.html] [last accessed September 17, 2012].

[19] UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); opened for signature December 10, 1984, 1465 UNTS 85. (entered into force June 26, 1987).

Convention on Human Rights,[20] and many others. The case law of the European Court, together with the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[21] has provided important guidance for the prohibition of torture and ill-treatment worldwide. No other international judicial body has dealt so extensively with the prohibition on torture and ill-treatment as has the European Court.[22]

1. The increasing importance of Article 3[23]

Plainly, Article 3 embodies a principle of fundamental importance. Yet in the first 50 years of the Court's operation, it accounted for a relatively small proportion of the

[20] Inter-American Convention on Human Rights; opened for signature November 22, 1969, 1144 UNTS 123 (entered into force July 18, 1978).

[21] Established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, opened for signature November 26, 1987, ETS 126 (entered into force February 1, 1989).

[22] Battjes, H, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22 *Leiden Journal of International Law* 583, 586.

[23] In what follows, the author's original analysis is based on statistics compiled from the following Court-released sources, which are hereafter referred to collectively as 'ECHR Annual Reports 2007-2011':

- European Court of Human Rights, 'Annual Report 2007' [2008] Registry of the European Court of Human Rights, Strasbourg;
- European Court of Human Rights, 'Annual Report 2008' [2009] Registry of the European Court of Human Rights, Strasbourg;
- European Court of Human Rights, 'Annual Report 2009' [2010] Registry of the European Court of Human Rights, Strasbourg;
- European Court of Human Rights, 'Annual Report 2010' [2011] Registry of the European Court of Human Rights, Strasbourg; and
- European Court of Human Rights, 'Annual Report 2011' [2012] Registry of the European Court of Human Rights, Strasbourg.

Further statistical analysis may be found in European Court of Human Rights, 'Analysis of Statistics 2011', January 2012; and European Court of Human Rights, 'European Court of Human Rights: Facts and Figures 2011' [2012] Council of Europe, Strasbourg.

Court's case load. Of the 15,000 judgments handed down in that period, just 7.5%, roughly 1,125 cases, concerned Article 3.[24] These cases were not evenly distributed over that time. The Court's early years were characterised by 'diplomacy…at the fore of the [Convention] system'.[25] The 'decisive transformation in the Court and its jurisprudence' began in the 1970s,[26] but it was in the 1990s that its caseload rapidly accelerated. The ten year period between 1998 and 2008 produced more than 90% of the Court's 50-year total.[27] These figures—and the problems they pose—will be familiar to followers of the European Court.[28]

Since 2008 there have been further expansions in the Court's caseload, such that it now has a backlog of more than 140,000 applications,[29] a number which

[24] European Court of Human Rights, 'European Court of Human Rights Overview: 1959-2011' [2012] Council of Europe, Strasbourg, 5.

[25] Hickman, T, 'The European Court of Human Rights Between Law and Politics: Publication Review' [2012] *European Human Rights Law Review* 357, 359.

[26] Madsen, MR, 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in Christoffersen, J, and MR Madsen (eds.) *The European Court of Human Rights Between Law and Politics* (OUP, 2011) 44-5.

[27] European Court of Human Rights, 'European Court of Human Rights: Some Facts and Figures 1998-2008' [2008] Council of Europe, Strasbourg, 5.

[28] See, e.g., Mahoney, P, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21 *Penn State International Law Review* 101; Caflisch, L, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 *Human Rights Law Review* 403; Helfer, LR, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125; Keller, H, A Fischer, and D Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2010) 21 *European Journal of International Law* 1025; O'Boyle, M, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862.

[29] European Court of Human Rights, 'Pending Applications Allocated to a Judicial Formation', June 30, 2012.

increases by between 10 and 12% each year.[30] The bulk of these cases—about 90%—are struck out as inadmissible.[31] Further, around 60% of the Court's judgments concern 'repetitive' applications, defined as those that relate to 'structural issues in which the Court has already delivered judgments finding a violation of the Convention and where a well-established case law exists.'[32] Just five States account for more than 60% of cases.[33] Despite the changes effected by the Interlaken Declaration[34] and the recently adopted Brighton Declaration,[35] the Court's 'bottleneck' remains substantial.[36]

While the total number of cases has increased considerably, an even more marked increase has occurred in the number of cases under Article 3. Cases under Article 3 have increased both as an absolute figure and as a proportion of the Court's caseload. Close analysis of the five year period between 2007 and 2011 reveals that the number of Article 3 violations *as a proportion of the total violations* increased significantly each year,[37] from 13.7% in 2008; to 17.4% in 2009; to 23.7% in 2010;

[30] Council of Europe, 'Protocol 14: The Reform of the European Court of Human Rights', May 15, 2010. See also O'Boyle (n 28).

[31] ibid.

[32] ibid.

[33] The five States are Russia, Ukraine, Poland, Romania and Italy; see O'Boyle (n 28) 1868.

[34] High Level Conference on the Future of the European Court of Human Rights, 'Interlaken Declaration', February 19, 2010.

[35] High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration', April 20, 2012.

[36] As at January 31, 2012 there were 152,000 pending applications: see the detailed report (and recommendations) of the European Law Institute, 'Statement on Case Overload at the European Court of Human Rights' (Vienna July 6, 2012) 11-12.

[37] Note that this is one third of violations found, not one third of applications filed or cases decided: see ECHR Annual Reports 2007-2011 (n 23).

to 29.1% in 2011. Over the last five years, violations of Article 3 have grown to the point that they now represent almost one third of all violations found by the European Court.[38] This figure is even more compelling when compared with the 50-year period between 1959 and 2008 where the number of Article 3 violations was just 7.5% of the total violations.[39] And if this trend of proportionate increases in the number of Article 3 violations continues, that number is set to rise further, and fast.

2. Explaining the numerical increase

How might we explain the marked increase in numbers of Article 3 violations? One possible explanation is that more and more incidents of inhuman or degrading treatment are occurring than ever before, at the same time that the jurisdiction of the European Court is expanding. Another possible explanation is that more of these incidents are being *reported* and *pursued,* even if their actual instance has not changed dramatically. This could be caused by a wide range of factors, including the Court's growing reputation in Contracting States, as well as 'distrust of domestic judiciaries in some countries, and entrenched human rights problems in others.'[40] More controversially, legal realists might argue that it is the characteristics and

[38] The Court introduced a 'Priority Policy' in 2010-11 aiming to concentrate resources on bringing important cases to a final conclusion quickly. It might be anticipated that this prioritisation would lead to an increase in violations of Article 3 found by the Court. However the trend towards proportionate increases in Article 3 violations began long before the implementation of the priority policy, as these figures reveal. See European Court of Human Rights, 'Analysis of Statistics 2011', January 2012. The 'Priority Policy' itself may be found at <http://www.echr.coe.int/NR/rdonlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010__Priority_policy__Public_communication.pdf> [last accessed 8 August 2012].

[39] Further empirical data, including a detailed statistical comparison of the growth in violations of other provisions, will be explored in the DPhil dissertation.

[40] Helfer (n 28) 126.

personalities of the judges which have changed, rather than the types of cases coming before the Court.[41]

There is probably no single—or even simple—answer to this question. Certainly, this thesis does not aim to provide one. But it does highlight the existence of one trend that might help to explain the increasing numbers of violations of Article 3. That trend is the broadening scope of the Court's interpretation of the meaning of the words 'inhuman or degrading treatment'. This thesis will show that the expanding ambit of those terms was made possible, and even necessary, by the hierarchical interpretation of Article 3 favoured by a majority of the European Court in the 1978 case of *Ireland.*[42] One consequence of the Court's narrow interpretation of 'torture' in that case was that the concepts of 'inhuman' and 'degrading' treatment have had to 'pick up the slack'. And pick up the slack they have done: the Court's elastic interpretation of those terms has not only broadened the types of conduct to which European supervision applies, but it has led the Court to implicitly introduce the language of limitations into the previously unqualified domain of Article 3.

Further detail on the components of the Article 3 figures is illuminating. The Court's annual reports break down Article 3 violations into three categories. They are: torture; inhuman and degrading treatment; and the obligation to conduct an effective investigation. This breakdown reveals that the absolute number of cases defined as 'torture' has hardly changed from year to year. Over the five-year period

[41] Although the ethnic and gender diversity has increased, in fact the demographic changed relatively little, in that most judges still come from academic backgrounds and may be described as being part of the same 'elite': see Madsen (n 26) 55.

[42] *Ireland* (n 1).

described above, the highest recorded number of torture violations found was 15 in 2011 and the lowest was just eight in 2009. So, while the total number of Article 3 violations increased by 220% between 2007 and 2011, the number of cases defined as torture has remained quite low.

At the same time, other categories of cases under Article 3 have experienced more substantial growth. A significant majority of the violations found by the European Court concern cases defined as 'inhuman or degrading treatment', not torture. Over the five-year period between 2007 and 2011 the proportion of cases on inhuman or degrading treatment fluctuated between 62 and 73% of the total number of Article 3 violations. Over the same period, torture accounted for just 3 to 9% of all violations under Article 3.[43] In absolute numbers, the Court found 81 cases of inhuman or degrading treatment in 2007, and 183 cases in 2011. The 2011 figure therefore represents an increase of 226% on the 2007 figure.

After inhuman or degrading treatment, the next most significant area of case law in numerical terms is the obligation to conduct an effective investigation under Article 3. This category of violations has grown by between 10% and 20% each year, with the exception of 2007-2008 when the increase was much more substantial, at

[43] In 2011, cases of inhuman or degrading treatment accounted for 63.7% of the total violations of Article 3, while cases of torture were just 5.2% of violations. The remaining third of violations were characterised as the lack of an effective investigation. In 2010, inhuman or degrading treatment cases were 71.4% of Article 3 violations, and torture accounted for just 4.3%. In 2009, torture cases comprised 3.1% of Article 3 violations while inhuman or degrading treatment accounted for 72.5%. In 2008, inhuman and degrading treatment accounted for 66.2% of the total violations of Article 3 in that year, while torture accounted for 5.6%. And finally, in 2007, torture cases accounted for 8.5% of the total Article 3 violations for that year, while inhuman and degrading treatment accounted for 62.8%. Statistics taken from the ECHR Annual Reports 2007-2011 (n 23).

nearly 50%. In total, the number of violations in this category grew from 37 in 2007, to 89 in 2011, representing an overall growth of 241% in five years.

This analysis shows that cases on inhuman or degrading treatment and the lack of an effective investigation largely explain the significant increase in Article 3 violations found by the European Court. The increase in these cases over the last five years has outpaced the overall increase in the Court's caseload, meaning that statistically, Article 3 is becoming more and more important relative to the overall caseload of the European Court. This thesis is concerned with the origins and implications of that development. In particular, it considers the increasing use of the 'inhuman or degrading treatment' ground for Article 3 violations, and offers a partial explanation.

3. The argument

In the crucial early case of *Ireland*,[44] the European Court interpreted Article 3 as embodying a spectrum of suffering. This 'severity spectrum' has been fundamental in the Court's approach to torture and ill-treatment in all subsequent cases. That spectrum includes three gradations of suffering, of which torture is positioned at the apex. 'Mere rough treatment' is positioned at the opposite end of the spectrum, and falls outside the ambit of Article 3. The second tier, according to the decision in *Ireland,* is characterised by inhuman or degrading treatment or punishment. This thesis will demonstrate how the severity spectrum established by the *Ireland* Court would ultimately convert the absolute Article 3 into a tiered scheme of protection.

[44] *Ireland* (n 1).

The application of the *Ireland* hierarchy has led to two developments. The first is a significant expansion in the ambit of Article 3. The second development is a necessary corollary of the first. To cope with the implications of the expanded application of the terms 'inhuman' and 'degrading', the Court has been compelled to introduce limiting devices into its Article 3 case law. These limiting devices have diluted the Article's absolute effect.

To explore these issues, this thesis focuses on two thresholds of defining importance in the Court's severity spectrum. The first threshold is the 'minimum level of severity to engage Article 3', that is, the level which distinguishes 'permissible roughness of treatment' from treatment contrary to Article 3. Following Evans, this threshold will be called 'the entry threshold'.[45] The second threshold is that between inhuman or degrading treatment or punishment, and the 'paradigm case' of torture. This threshold will be referred to as 'the torture threshold'. While the torture threshold has been closely controlled, the entry threshold has been generously applied in the Court's case law. These two thresholds—one rigid, the other elastic—paved the way for the Article's expanding ambit.

An expansive approach to Article 3 is not without its practical benefits. Human rights advocates may welcome the increased scope of European supervision over such areas as corporal punishment;[46] prison sentences[47] and prison

[45] Evans, MD, 'Getting to Grips with Torture' (2002) 51 *International & Comparative Law Quarterly* 365.

[46] See, e.g., *Tyrer v United Kingdom* (1979-80) Series A no 26 (Tyrer); Ca*mpbell and Cosans v United Kingdom* (1982) 4 EHRR 293; *Costello Roberts v United Kingdom* (1995) 19 EHRR 112.

conditions;[48] the conditions in social care homes;[49] the living conditions in villages nearby pollutant industries;[50] the adequacy of social welfare allowances;[51] the pain and suffering of relatives of missing persons;[52] and those who have lost family in wars long since past.[53] Doubtless, judgments of the European Court have been the catalyst for a range of positive changes in conditions in public institutions, and with the development of the Court's jurisprudence on socio-economic rights, Article 3 may yet be the source of a 'last-resort safety net for the most deprived'.[54] But these advantages have come at a cost: for if Article 3 is to apply across this increased range of areas, there is a necessary dilution of the ostensibly 'absolute' effect.

[47] See, e.g., *Kafkaris v Cyprus* (2009) 49 EHRR 35; *Harkins and Edwards v United Kingdom* (2012) 55 EHRR 19 (Harkins); *Vinter & Ors v United Kingdom* App no 66069/09 (ECtHR 17 January 2012) (Vinter), and many others.

[48] See, e.g., *Peers v Greece* (2001) 33 EHRR 51; *Valasinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001); *Dougoz v Greece* (2002) 34 EHRR 61; *Kudla v Poland* (2002) 35 EHRR 11; *Kalashnikov v Russia* (2003) 36 EHRR 34; *Aleksanyan v Russia* (2011) 52 EHRR 18; *Khodorkovskiy v Russia* (2011) 53 EHRR 32; *Ananyev v Russia* (2012) 55 EHRR 18, and many others.

[49] *Stanev v Bulgaria* (2012) 55 EHRR 22 (GC).

[50] *Lopez Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994).

[51] See, e.g., *Larioshina v Russia* App no 56869/00 (ECtHR, 25 June 1999) (admissibility); *O'Rourke v United Kingdom* App no 39022/97 (ECtHR, 26 June 2001) (admissibility); *Budina v Russia* App no 45603/05 (ECtHR, 18 June 2009) (admissibility).

[52] See, e.g., *Kurt v Turkey* (1999) 27 EHRR 373.

[53] *Janowiec & Ors v Russia* App nos 55508/07 and 29520/09 (ECtHR, 16 April 2012) (Janowiec).

[54] O'Cinneide, C, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 European Human Rights Law Review 583, 601. See also Mowbray, AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004); Palmer, E, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 *Erasmus Law Review* 397.

4. Structure

This thesis is divided into two parts. Part A examines and critiques the hierarchy deriving from the *Ireland* case. The justifications the Court offered for reserving a 'special stigma' to torture alone were twofold. The Court implicitly referenced the *travaux preparatoires* to the European Convention, and a UN General Assembly Resolution, both of which will be strongly interrogated in this chapter. A third justification could have been, but was not expressly sought, in the *Greek Case*:[55] this too will be reviewed here. This chapter argues that the Court was wrong to divide Article 3 into a hierarchical protection.

Part B considers the consequences of the *Ireland* hierarchy in the case law of the Court. The excessively narrow concept of torture, together with the broad and inclusive concepts of 'inhuman or degrading treatment' have created serious problems for the Court. This chapter explores the limitation devices that the Court has introduced into its recent case law to control the consequences of its elastic entry threshold. The use of these limitations in the context of Article 3 poses serious questions regarding the survival of this ostensibly unqualified right.

5. Measuring stick

This thesis evaluates the case law of the European Court against two benchmarks. They are, first, the extent to which the case law offers a coherent conception of the prohibition on torture and ill-treatment, which is internally consistent and clear. These qualities of coherence, consistency and clarity offer a measure of the extent to which Article 3 is capable of acting as a guide to citizens, practitioners, courts and

[55] *The Greek Case* (1969) 12 YB 1.

officials.[56] Second, this thesis assesses the case law for the extent to which it maximises the rights that the European Convention seeks to protect. The rights-maximising approach has been described elsewhere in different terms. It is not dissimilar to Alexy's concept of principles as 'optimisation requirements'.[57] According to Lazarus, the 'human rights principle' refers to the presumption that the legislature, executive, and judiciary will respect human rights.[58] The human rights principle establishes an 'onus of justification', which means that limitations on human rights carry a corollary obligation on the State—which includes courts—to justify its actions in terms of those restrictions.[59] These frameworks suggest ways of structuring limitations on rights. Although Article 3 is, in terms, absolute, this thesis argues that the Court implicitly uses a range of devices to balance and limit the rights embodied in that Article.

6. Literature and limitations

The phenomenon of torture has been the subject of vast academic analysis, from moral and political philosophy, to international law, criminal law and criminology, history, psychology and sociology.[60] These multidisciplinary analyses are largely

[56] Raz, J, 'The Rule of Law and its Virtue', in Raz J, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 2002).

[57] Alexy, R, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294; and his *A Theory of Constitutional Rights* (OUP New York, 2002).

[58] Lazarus, L, 'Conceptions of Liberty Deprivation' (2006) 69 *Modern Law Review* 738.

[59] Dyzenhaus, D, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11.

[60] See, e.g., Shue, H, 'Torture' (1978) 7 *Philosophy & Public Affairs* 124; Dershowitz, AM, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New edn, Yale University Press 2002); Moher, AA, 'The Lesser of Two Evils - An Argument for Judicially Sanctioned Torture in a Post-9/11 World' (2003) 26 *Thomas*

beyond the scope of this thesis, which focuses on the much more limited terrain of Article 3 of the European Convention.

The literature on Article 3—as distinct from the more general literature on torture and other like forms of ill-treatment—falls into several streams. First, there are excellent academic textbooks, such as Harris, O'Boyle and Warbrick,[61] Clayton and Tomlinson,[62] and many others. These works consider the provisions of the European Convention Article by Article and set out the applicable principles and

Jefferson Law Review 469; Elshtain, JB, 'Reflection on the Problem of "Dirty Hands"', in Levinson, S (ed.), *Torture: A Collection* (OUP 2004) 77-89; Shue, H, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2005) 37 C*ase Western Reserve Journal of International Law* 231; Davis, M, 'The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment' (2005) 19 *International Journal of Applied Philosophy* 161; Roth, K, and M Worden, eds., *Torture: Does It Make Us Safer? Is It Ever OK?: A Human Rights Perspective* (New Press, 2005); Rodley, NS, and M Pollard, 'Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 *European Human Rights Law Review* 115; Fox, H, 'State Immunity and the International Crime of Torture' (2006) 2 *European Human Rights Law Review* 142; Friedman, D, 'Torture and the Common Law' [2006] *European Human Rights Law Review* 180; Langbein, JH, *Torture and the Law of Proof : Europe and England in the ancien régime* ([New ed.]. University of Chicago Press 2006); Rejali, DM, *Torture and Democracy* (Princeton University Press 2007); Bagaric, M, and J Clarke, *Torture: When the Unthinkable Is Morally Permissible* (SUNY Press 2007); Ojeda, AE, ed., *The Trauma of Psychological Torture* (Greenwood Press 2008); Başoğlu, M, 'A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture' (2009) 79 *American Journal of Orthopsychiatry* 135; Hajjar, L, 'Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' (2009) 5 *Annual Review of Law and Social Science* 311; McDonnell, M-HM, LF Nordgren, and G Loewenstein, 'Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy' (2011) 44 *Vanderbilt Journal of Transnational Law* 87; Fulton, S, 'Cooperating with the Enemy of Mankind: Can States Simply Turn a Blind Eye to Torture?' (2012) 16 *The International Journal of Human Rights* 773; Hathaway, OA, A Nowlan, and J Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 *Virginia Journal of International Law* 791.

[61] Harris, D, M O'Boyle, E Bates, and C Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009).

[62] Clayton, R, and H Tomlinson, eds., *The Law of Human Rights* (2nd edn, OUP 2009).

cases. In a similar category are practitioners' handbooks,[63] textbooks and guidelines issued to States on the implementation of Article 3.[64] Second, there are more narrow academic analyses of particular thematic areas of Article 3 case law, such as expulsion cases;[65] cases on prisoner's rights and prison conditions;[66] socio-economic rights;[67] the admissibility of evidence obtained by ill-treatment,[68] and many others.[69] Third, there are comparative analyses of Article 3 and other, similar protections in regional and international treaties, national constitutions and

[63] See, e.g., Cooper, J, *Cruelty: An Analysis of Article 3* (Sweet & Maxwell 2003).

[64] See, e.g., Reidy, A, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights* (Directorate General of Human Rights, Council of Europe 2002); the work of the European Committee for the Prevention of Torture, including, inter alia, *20 Years of Combating Torture*: 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1 August 2008-31 July 2009) (Council of Europe Publishing 2009); Morgan, R, and MD Evans, *Combating Torture in Europe: The Work and Standards of the European Committee for the Prevention of Torture* (Council of Europe 2001).

[65] See, e.g., Den Wyngaert, Christine Van, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 *International & Comparative Law Quarterly* 757; Fabbricotti, A, 'The Concept of Inhuman or Degrading Treatment in International Law and Its Application in Asylum Cases' (1998) 10 *International Journal of Refugee Law* 637; Battjes (2009) (n 22); Izumo, A, 'Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010) 42 *Columbia Human Rights Law Review* 233.

[66] See, e.g.,Foster, S, 'Article 3 of the European Convention, the Human Rights Act and Prison Conditions' (2004) 9(2) *Coventry Law Journal* 25.

[67] See, e.g., Cassese, A, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2 *European Journal of International Law* 141; Mowbray (2004) (n 54); Koch, IE, *Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009); Palmer (2009) (n 54); O'Gorman, R, 'The ECHR, the EU and the Weakness of Social Rights Protection at the European Level' (2011) 12 *German Law Journal* 1833.

[68] Grief, N, 'The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law' [2006] *European Human Rights Law Review* 201.

[69] See, e.g., Bueren, G Van, *Childhood Abused: Protecting Children Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment* (Dartmouth 1998).

national laws.[70] Fourth, there are analyses of the interpretation of Article 3 by domestic courts.[71] Lastly, there are some (albeit few) analyses of the meaning of particular components of Article 3, such as Webster's doctoral dissertation on 'degrading treatment' as the inverse of human dignity,[72] and Waldron's analysis of the meaning of the terms 'inhuman' and 'degrading' in and of themselves.[73]

This thesis aims to contribute to the latter strand of the literature by analysing some of the cross-cutting issues arising under Article 3 case law.[74] It focuses on the original doctrine of the European Court, and comprehensively considers the mechanics of its Article 3 decision making. In this way it provides a closely focussed companion to the more general texts listed above. The cross-cutting

[70] See, e.g., Cullen, A, 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights' (2003) 34 *California Western International Law Journal* 29; Nowak, M, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 *Human Rights Quarterly* 809; see also the valuable reports of NGOs such as Amnesty International, *Combating Torture: A Manual for Action* (Amnesty International 2003).

[71] See, e.g., Sweeney, JA, 'The Human Rights of Failed Asylum Seekers in the United Kingdom' [2008] *Public Law* 276; Lawson, A, and A Mukherjee, 'Slopping Out in Scotland: The Limits of Degradation and Respect' (2004) 6 *European Human Rights Law Review* 645.

[72] Webster, E, 'Exploring the Prohibition of Degrading Treatment Within Article 3 of the European Convention on Human Rights' (Doctoral thesis, University of Edinburgh 2009).

[73] Waldron, J 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23 *Canadian Journal of Law and Jurisprudence* 269.

[74] This approach draws on the work of Goss, R, 'Rethinking Article 6' (DPhil thesis, Oxford University 2012).

literature on Article 3 is limited in nature and relatively out of date,[75] whereas the scope of Article 3 has undergone radical change in 2012 alone.[76]

7. Methodology

This thesis is primarily interpretive, and focuses on two primary sources: namely, the terms of the European Convention, and the case law of the European Court. The starting point for identifying the relevant cases was the European Court's own case law database, 'HUDOC', which listed 1469 cases in English under Article 3, as at 25 September 2012. Of these, 243 were ranked by the Court's Jurisconsult[77] as having the highest level of importance, meaning that they 'make a significant contribution to the development, clarification or modification of the Court's case-law, either generally or in relation to a particular state.'[78] This list of cases of high importance was cross-referenced against Harris, O'Boyle and Warbrick,[79] and Clayton and Tomlinson[80] to ensure adequate coverage of the issues arising under Article 3.

[75] See, e.g., Duffy, PJ, 'Article 3 of the European Convention on Human Rights' (1983) 32 *International & Comparative Law Quarterly* 316.

[76] *Harkins* (n 47); *Vinter* (n 47); *Othman (Abu Qatada) & Ors v United Kingdom* (2012) 55 EHRR 1 (Abu Qatada); *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 (GC); Janowiec (n 53); *Babar Ahmad & Ors v United Kingdom* 24027/07 [2012] ECHR 609 (Babar Ahmad); *Stanev v Bulgaria* (n 49); *Piechowicz v Poland* App no 20071/07 (ECtHR April 17, 2012); *Idalov v Russia* App no 5826/03 (ECtHR May 22, 2012) (GC); *Dordevic v Croatia* App no 41526/10 (ECtHR July 24, 2012); *El Haski v Belgium* App no 649/08 (ECtHR September 25, 2012).

[77] The Jurisconsult is the body responsible for case law monitoring at the European Court. Its selection and ranking of cases for the HUDOC database and the Court's Reports of Judgments and Decisions is also checked by the Bureau, which is a body composed of the President and Vice-Presidents of the Court along with the Section Presidents.

[78] European Court of Human Rights, 'HUDOC User Manual', June 2012, 11.

[79] Harris, O'Boyle & Warbrick (n 61).

[80] Clayton and Tomlinson (n 62).

Where the Court cited authorities for particular propositions of import to the issues covered in this thesis, but which did not appear on the Court's 'high importance' list, those authorities were also reviewed.

8. Terminology

Throughout this thesis the term 'inhuman or degrading treatment' will be used as a shorthand to refer to inhuman or degrading treatment as well as inhuman and degrading punishment. The *travaux preparatoires* to the European Convention contains no reference to the specific meaning of the terms 'treatment' and 'punishment', but the annotated text of the almost identical Article 7 of the International Covenant on Civil and Political Rights (ICCPR) says that 'the word "treatment" was [understood to be] broader in scope than the word "punishment"'.[81] The distinction between 'treatment' and 'punishment' was referenced in *Ireland*[82] and in *Tyrer*,[83] but it has not been significant in recent cases. Hence, the term 'treatment' is used inclusively here.

The terms 'torture and ill-treatment', following the *Greek Case*,[84] will be used to refer collectively to the concepts prohibited by Article 3.

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[81] 'Extract from Annotation on Draft International Covenants on Human Rights Prepared by the Secretary-General of the U.N.O', contained in Appendix 1, Council of Europe, 'Preparatory Work on Article 3 of the European Convention on Human Rights,' (Strasbourg May 22, 1956) 18 ('Preparatory Work 1956').

[82] *Ireland* (n 1) 58 [164] (the Court).

[83] *Tyrer* (n 46) [25]; the Court distinguished the Ireland case on the basis that '[t]hat judgment contains various indications concerning the notions of "inhuman treatment" and "degrading treatment" but it deliberately left aside the notions of "inhuman punishment" and "degrading punishment" which alone are relevant in the present case …Those indications accordingly cannot, as such, serve here'.

[84] *Greek Case* (n 55) 186.

The term 'domestic case' will be used to refer to allegations of ill-treatment which have been, or will be, committed within the territory of Contracting States. These cases may be contrasted with 'expulsion cases', which term refers to cases where the alleged ill-treatment has occurred or will occur outside the jurisdiction of Contracting States. The term 'expulsion' is used generally to include extradition, *refoulement*, deportation or any other kind of removal from the territory of a Contracting State.[85]

[85] This terminology follows Battjes, H (n 22) 587-8.

PART A: INTERROGATING THE IRELAND HIERARCHY

Introduction

In order to assess the distinction drawn by the Court between torture, inhuman treatment, and degrading treatment, this Part considers the European Court's first decision on Article 3: *Ireland v United Kingdom*.[86] It was here that the Court established a hierarchical distinction between torture on the one hand, and inhuman or degrading treatment or punishment on the other hand.

This Part is divided into five subsections. The first subsection considers the factual background of the *Ireland* case and the impugned interrogation techniques. In the second subsection, the majority judgment is critiqued according to the values of consistency, coherence and the rights-maximising approach outlined in the introduction. The third subsection outlines the bases of the separate opinions. The fourth attacks the bases upon which the majority judgment established a two-tiered protection in Article 3. This chapter concludes with a discussion of the Court's

[86] *Ireland* (n 1).

severity spectrum and the resultant importance attached to the entry and torture thresholds.

1. The facts of *Ireland v United Kingdom*

Ireland arose from the conflict over the constitutional status of Northern Ireland. A period of brutal violence from the 1960s to the late 1980s, known as 'the Troubles', claimed many lives on both sides of the conflict. Between 1971 and 1975 the Northern Irish authorities exercised a series of emergency powers including extrajudicial arrest, detention, and extensive interrogation techniques, known as 'sensory deprivation' to glean information about possible terrorist plots.[87] Under the rarely used inter-State complaint procedure for the European Convention,[88] Ireland sued the UK, alleging (inter alia)[89] an official practice of ill-treatment by the Northern Irish authorities in breach of Article 3 of the European Convention.

The Article 3 allegations concerned the so-called 'interrogation in depth' of detainees by the Northern Irish Royal Ulster Constabulary. The interrogation involved the combined use of five techniques, which both parties accepted had been authorised 'at a high level' and had been taught to security forces at the English Intelligence Centre. The techniques were 'wall-standing' (standing close to a wall in a spread-eagled position with the weight of the body held on the fingers); hooding;

[87] The majority judgment contains a summary of the emergency powers and the background to the conflict: *Ireland* (n 1) 5-33 [11]-[91] (the Court).

[88] Article 33 provides that 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.' At the time, this provision was numbered Article 24.

[89] Ireland also challenged the legality of the UK's emergency derogation under Article 15, and the legality of the widespread arrests and detentions under Article 5.

subjection to noise; sleep deprivation; and deprivation of food and drink.[90] The European Commission found that applicants in the illustrative cases had been subjected to wall-standing for periods of between 20 and 30 hours.[91] The Commission was not able to determine whether and for how long they had been sleep- and nourishment-deprived, but concluded that they experienced both weight loss and 'acute psychiatric symptoms'.[92] The Commission also found it 'probable that physical violence was sometimes used in the forcible application of the five techniques,'[93] and that at least some of the detainees at some locations had been 'severely beaten'.[94] These beatings were not occasional but were 'applied in a sort of scheme in order to make them speak'.[95] One detainee was 'insulted, kicked, beaten and dragged by the hair'[96]. This treatment was 'not connected with his formal interrogation' but was inflicted during transport to one of the interrogation centres for questioning by a separate branch.[97] The injuries sustained by detainees at some locations were described by the Commission as 'massive' and 'substantial'.[98]

[90] *Ireland* (n 1) 34-35 [96].

[91] ibid 37 [104].

[92] ibid 37 [104].

[93] ibid 37-38 [105].

[94] ibid 39 [110].

[95] ibid.

[96] ibid 43 [120].

[97] ibid.

[98] ibid 39-40 [111].

Because the ill-treatment varied at different locations[99] —for example, at some centres there was wall-standing together with heavy beating, while at other centres the focus was on sensory deprivation rather than wall-standing—the Court spent considerable time going through the evidence of which techniques were used at different centres. The interrogations at many of the centres were conducted by the same officers on a rotating system.[100] Although it was 'improbable that these men observed Article 3 in the second of these centres when they contravened it in the first', this was not considered 'conclusive on its own'.[101]

2. The majority decision in *Ireland v United Kingdom*

The European Court held by sixteen votes to one that the police and army had perpetrated a practice of inhuman and degrading treatment at several locations in Northern Ireland. But in a dubious moral victory for the UK, the Court said no practice of torture had been established. It was in this finding that the concept of a severity spectrum was born.

The severity spectrum allowed the Court to avoid endorsing the perception that the UK 'stood convicted, so to speak, of that grave charge [of torture].'[102] Commentators at the time argued that, since 'a finding of torture would have been attended by public antipathy towards the perpetrators, the Court allowed its

[99] e.g., Palace Barracks, Girdwood Park regional holding centre, Ballykinler military camp, several other unidentified interrogation centres, and other 'miscellaneous places' such as army posts or on the street: ibid 45 [127].

[100] ibid 38 [108], 63 [183].

[101] ibid 63 [183].

[102] ibid 101 [5] (Fitzmaurice J).

concern with the consequences of its decision to determine its definition of torture.'[103] Labelling the British in this way may have exposed British and Northern Irish police and armed forces to further attacks. Ni Aolain argues that the ability to label rights human violations as aberrations is essential to the self-perception of the Contracting States.[104] This is because the consequences 'of being deemed a gross violator of human rights may be quite extensive in political terms, when participation in international human rights structures is a defining feature (externally and internally) of [the] constitutionalism and democratic standing' of the State.[105]

The Court said there were three gradations on the spectrum of severity. At one end was 'mere rough handling' not so severe as to fall foul of Article 3.[106] This 'rough handling' was described by the majority as 'violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention.'[107] The Court was prepared to concede that the combined use of the five techniques by the RUC in Northern Ireland had exceeded this threshold. They observed that the 'five techniques caused considerable suffering, exceeding the level of 'mere rough handling'. They were applied 'with premeditation and for hours at a stretch', and that they caused 'intense physical and mental suffering… and also led to acute

[103] Spjut, RJ, 'Torture Under the European Convention on Human Rights' (1979) 73 *American Journal of International Law* 267, 271.

[104] Ni Aolain, F, 'The European Convention on Human Rights and its Prohibition on Torture', in Levinson, (n 60) 213-227, 222.

[105] ibid.

[106] *Ireland* (n 1) 89 (Zekia J).

[107] ibid 59 [167] (the Court).

psychiatric disturbances'.[108] They had therefore attained the 'minimum level of severity…to fall within the scope of Article 3.'[109] However, the Court said 'they did not occasion suffering of the particular intensity and cruelty implied by the word torture'. Torture, in the Court's view, was subject to 'a special stigma' for 'deliberate inhuman treatment causing very serious and cruel suffering.'[110]

Inhuman or degrading treatment, therefore, was an intermediate tier on the spectrum of severity.[111] The Court said that there was a distinction 'embodied' in Article 3 between the notion of torture and that of inhuman or degrading treatment.[112] The European Commission had, in its examination of the case, concluded likewise. Significantly, the Court said that the distinction 'derives principally from a difference in the intensity of the suffering inflicted'.[113] The difference between them was one of degree, not kind. The extended application of the techniques and the suffering they caused were 'accordingly' to be regarded as inhuman. They also earned the label 'degrading' because 'they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'[114] There was a further violation in respect of one of the applicants, for whom the Court said that 'security forces subjected [him] to assaults severe enough to constitute

[108] ibid 58 [167].

[109] ibid 58 [162].

[110] ibid 59 [167].

[111] What is here called the second tier of the *Ireland* hierarchy.

[112] *Ireland* (n 1) 58 [167].

[113] ibid 58 [167].

[114] ibid 58 [167].

inhuman treatment'.[115] Although the five techniques were 'sometimes accompanied by physical violence' there was insufficient evidence 'to support a finding of breaches of Article 3 over and above that resulting from the application of the five techniques.'[116]

In reserving a 'special stigma' for torture over and above inhuman or degrading treatment, the Court effectively said that a breach of Article 3 in one form (inhuman or degrading treatment) was less serious than a breach of Article 3 in its highest form (torture). It is not immediately clear why this distinction was necessary: Article 3 is, at least ostensibly, a unitary provision, and the Article 15 non-derogation provision applies equally to it all. But the Court argued that a greater degree of moral opprobrium should be reserved for 'torture'. This result would be immeasurably significant for the future of Article 3 case law.

3. The separate opinions in *Ireland v United Kingdom*

The severity spectrum, from the beginning, was controversial. Four judges dissented from the majority's determination that the ill-treatment was not severe enough to be regarded as 'torture.' Judge Fitzmaurice dissented entirely, arguing that the five techniques did not fall within the scope of Article 3 at all. These disagreements reflect doubts about the basis for the *Ireland* hierarchy as well as the degree of ill-treatment which the Court thought constituted torture.

[115] ibid 59 [170].

[116] ibid 59 [169]-[171].

Three judges rejected the severity spectrum outright. Judge Zekia said that the concept of torture itself allowed gradations 'in in its intensity, in its severity and in the methods adopted.'[117] Judge Fitzmaurice said that 'torture involves a wholly different order of suffering from that which falls short of it. It amounts not to a mere difference of degree but a difference of kind.'[118] Judge Evrigenis disagreed both with the majority's differentiation between torture and inhuman treatment, and with their factual assessment of the combined use of the techniques. His persuasive discussion of the *travaux preparatoires* to the Convention will be dealt with below.

Judges O'Donoghue and Matscher did not necessarily reject the severity spectrum, but thought the suffering occasioned by the five techniques amounted to torture. The former observed that '[o]ne is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar appliances were employed.'[119] The latter held that 'the element of intensity [was] complementary to the systematic element: the more sophisticated and refined the method, the less acute will be the pain'.[120] These judges would have held that the combined use of the five techniques constituted a practice of torture.

Judges O'Donoghue, Matscher and Evrigenis strongly emphasised the mental element to the physical torture undergone by victims of the five techniques. For Judge Evirgenis, '[t]orture no longer presupposes violence;'[121] for Judge

[117] ibid 91 (Zekia J).

[118] ibid 118 [35] (Fitzmaurice J).

[119] ibid 96 (O'Donoghue J).

[120] ibid 126 (Matscher J).

[121] ibid 124 (Evrigenis J).

O'Donoghue, 'there can be little doubt that torture may be inflicted in the mental sphere.'[122] These comments suggest they thought the majority opinion underestimated the extent and severity of the mental suffering that the use of the five techniques induced. Contemporary philosophical and psychological inquiries have provided further support for the argument that 'mental' and 'physical' suffering are inextricably linked.[123]

Judge Fitzmaurice's opinion, in some respects astounding, stood alone. In his view, the five techniques caused 'mere aches, pains, strains, stresses and discomforts' and could not be compared to 'the searing, unimaginable, agony of [torture]'.[124] For Judge Fitzmaurice, 'inhuman treatment' should be understood as that which does 'grave violence to the human, as opposed to the animal, element in his or her make-up'.[125] He expressed the view, by reference to some startling examples, that degrading treatment was that which was 'seriously humiliating,

[122] ibid 96 (O'Donoghue J).

[123] See, e.g., Scarry (n 7); Reyes, H, 'The Worst Scars are in the Mind: Psychological Torture' (2007) 89 *International Review of the Red Cross* 591; Luban, D, and H Shue, 'Mental Torture: A Critique of Erasures in U.S. Law' (2011) 100 *Georgetown Law Journal* 823.

[124] ibid 118 [35] (Fitzmaurice J).

[125] ibid 113 [26] (Fitzmaurice J).

lowering as to human dignity, or disparaging'.[126] As to the objective nature of the test, he said, 'it is the character of the treatment that counts, not its results.'[127]

4. The bases for the *Ireland* hierarchy

The two justifications offered by the *Ireland* court for their hierarchical interpretation of Article 3 were the intention of the drafters of the European Convention, and the 'thinking lying behind' General Assembly Resolution 3452.[128] It is arguable that the 'plain and ordinary meaning' test was implicitly considered by the Court. But the majority did not expressly refer to the Vienna Convention, the *travaux preparatoires* to the European Convention, or the UN Declaration. They simply inferred that intention from the text. The critical passage of the Court's decision said that:

> The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an

[126] ibid 114 [27] (Fitzmaurice J): '[Degrading treatment] should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt,—although here one may pause to wonder whether Christ was really degraded by being made to don a purple robe and crown of thorns and to carry His own cross.'

[127] ibid 115 [28] (b) (Fitzmaurice J).

[128] ibid 58 [167] (the Court).

aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".[129]

The other justification that could have been, but was not, invoked, was the opinion of the European Commission in the *Greek Case*.[130] But the hierarchical distinction finds limited support in these sources. Each will be examined in turn.

(i) The Travaux Preparatoires do not support a hierarchical conception of Article 3

The majority of the Court invoked the intention of the drafters in support of the *Ireland* hierarchy. In the context of a discussion of whether the five techniques should 'be qualified as torture', the Court said it must have regard to the distinction, 'embodied in Article 3, between this notion and that of inhuman or degrading treatment.'[131] The Court said that 'it *appears*' to have been 'the intention' to 'attach a special stigma' to torture, defined as 'deliberate inhuman treatment causing very serious and cruel suffering.'[132] No further analysis of the *travaux preparatoires* of the Convention was conducted.

This was regrettable. Not only does the *travaux preparatoires* not support the *Ireland* hierarchy, in fact it provides evidence that a different level of stigma for torture and inhuman and degrading treatment was actually contrary to the intention of the drafters. Indeed this was the basis of the separate and dissenting opinion of Judge Evrigenis in the *Ireland* case. He was the only Judge to expressly consider these materials. Judge Evrigenis said:

[129] ibid.

[130] *Greek Case* (n 55).

[131] *Ireland* (n 1) 59 [167] (the Court).

[132] ibid 59 [167] (the Court) (emphasis added).

> By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the Universal Declaration of Human Rights, to **extend** the prohibition in Article 3 of the Convention—in principle directed against torture (cf. Collected Edition of the 'Travaux Preparatoires', volume II, pp. 38 et seq., 238 et seq.)—to other categories of acts causing intolerable suffering to individuals or affecting their dignity **rather than to exclude** from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a 'stigma'—to use the word appearing in the judgment. The clear intention of **widening the scope of the prohibition** in Article 3 by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture.[133]

As to whether the five techniques constituted torture, Judge Evrigenis said, 'I cannot characterise in another way treatment which, on the basis of the facts relied on by the Court (…) caused "substantial" and "massive" injuries to the detainees.'[134]

Applying the *Vienna Convention on the Law of Treaties*, the Court ought have looked to the ordinary meaning of the words 'torture', 'inhuman' and 'degrading', and construed them in their context and in light of the object and purpose of the European Convention.[135] It is possible that the Court implicitly did so, but found the ordinary construction ambiguous. Indeed it has often observed that the word 'torture' is not susceptible to exact or comprehensive definition, and that none is attempted by Article 3.[136]

Viewing Article 3 in the context of other provisions of the treaty provides support for a unitary, rather than hierarchical, interpretation. Article 15 prevents derogations from Article 3 under any circumstances, and Article 3 contains no in-

[133] ibid 123-124 (Evrigenis J) (emphasis added).

[134] ibid 125 (Evrigenis J).

[135] See Articles 31(1) and 32, Vienna Convention on the Law of Treaties (n 12).

[136] See for example: *Ireland* (n 1) 89 (Zekia J), 105 (Fitzmaurice J).

built limitation clause. Whether one part of that Article could be protected more or less 'absolutely' is open to doubt. The 'object and purpose of the treaty' confirms this unitary approach: post World War II, with the events of the Holocaust fresh in stricken European minds, the object and purpose of the Convention was to provide the strongest protection possible against all forms of ill-treatment.[137] As indicated in the opinion of Judge Evrigenis, a close reading of the seven-volume *travaux preparatoires* yields little or no support for the Court's hierarchical conception of Article 3,[138] suggesting instead that the intention was to prevent a restrictive approach being adopted towards the definition of torture. Far from limiting the types of ill-treatment to which the term 'torture' could be applied, the drafters sought to broaden the category of treatment which would be absolutely, unqualifiedly, prohibited.

The intention in the early stages may be discerned from the draft articles and accompanying debates, which focussed on broad language such as 'security of life and limb', 'security of person', and 'the sanctity of the human body'.[139] Such language indicates the drafters' desire to provide a broad protection for the body and person. The middle stages of the drafting process were characterised by a series of debate

[137] See, inter alia: Preparatory Work 1956 (n 81); Council of Europe, 'Preparatory Work on Article 3 of the European Convention on Human Rights,' (Strasbourg April 8, 1970) (Preparatory Work 1970).

[138] This position is supported by a number of commentators, including, inter alia, Cullen (n 70); Evans, MD, and R Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (OUP 1998) 74, where the authors observed that the Court's approach in breaking down Article 3 into its component parts was not suggested by the travaux preparatoires.

[139] Speech of Mr Seymour Cocks, British Representative, to the Consultative Assembly on 8 September 1949, quoted in Preparatory Work 1956 (n 81) 3.

over the question whether ill treatment ought to be defined with more specificity. At the urging of British representative Mr Cocks, it was proposed to include references to 'mutilation', 'sterilization', 'any form of torture or beating', the forced taking or administration of drugs without consent, and the subjection to 'imprisonment with such an excess of light, darkness, noise, or silence as to cause mental suffering.'[140] Mr Cocks expressed the view that this was the most fundamental of all the rights in the Convention, and that the right to be free of 'all forms of physical torture' followed directly from the obligation upon states to guarantee Convention rights. He suggested that the following passage be set as an introduction to the Convention:

> The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organizations or any other persons are inconsistent with civilized society, are offences against Heaven and Humanity and must be prohibited. It declares that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life or even for the safety of the State. It believes that it would be better even for Society to perish than for it to permit this relic of barbarism to remain.[141]

These amendments were not opposed on the basis that there ought to be a stigmatic distinction between torture and other forms of ill-treatment. To the contrary, opponents argued that the level of specificity could 'make weaker and throw doubt upon the other points which are not specially mentioned.'[142] The suggestion was that other forms of torture, not specifically mentioned in Article 3, might be thought not to have been forbidden.[143] As a compromise, the French representative Mr Teitgen proposed an accompanying special resolution declaring that:

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[140] ECHR Travaux (n 3) vol I, 116-7.

[141] ECHR Travaux (n 3) vol II, 2-4.

[142] Preparatory Work 1956 (n 81) 7-8 (Mr Teitgen).

[143] ibid.

> The Consultative Assembly solemnly declares that any use of torture by public authorities or individuals is a crime against humanity and can never be justified on the grounds that it is being used for extracting information to save life or to protect the interests of the State or on any other grounds whatsoever. The Assembly records its abhorrence at the subjection of any person to any form of mutilation or sterilization or beating.[144]

This episode reinforces the drafters' concern at all times to avoid weakening the prohibition, and illustrates a concern that the text would be narrowly construed.

At the final stage of the drafting process, two alternative versions of the Convention, including slightly different versions of Article 3, were debated. The only difference between the alternatives was the inclusion in one of the word 'cruel'.[145] Unfortunately, no account of the final discussion is available, apparently due to the small size of the Secretariat at that time.[146] The debate outlined above assumes even more importance in light of the limited information available regarding this stage of the drafting.

There is no evidence from the *travaux* that a different level of stigma was intended to attach to 'torture' versus 'inhuman or degrading treatment or punishment'. Instead the evidence indicates that, as Judge Evrigenis said,[147] the inclusion of the words 'inhuman and degrading treatment' was intended to extend

[144] Representatives for Sweden, Denmark and Norway opposed specific reference to sterilisation, seeking to protect their countries' right to retain forced sterilization for sexual criminals. A British representative also expressed concern that the reference to 'beating' would carry implications for the use of corporal punishment, still a valid penalty for some offences under English law. ECHR Travaux (n 3) vol II, 238-46.

[145] ECHR Travaux (n 3) vols III-IV.

[146] ECHR Travaux (n 3) vol III (preface).

[147] *Ireland* (n 1) 123-124 (Evrigenis J).

the absolute prohibition, and severe moral opprobrium, across both tiers of what would later become the *Ireland* hierarchy.

(ii) The Court's reference to the UN Declaration was inapt

Occurring immediately after the majority's invocation of the apparent intention behind the Convention was an oblique reference to the 'thinking lying behind Article 1… of Resolution 3452 (XXX)'.[148] This was a reference to the UN Declaration of the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[149] However, the majority's reliance on the UN Declaration was problematic in two respects.

First, relying on the UN Declaration was effectively self-referential. The drafting history of the UN Declaration reveals that it was strongly influenced by the European Commission's own decision in the *Greek Case*.[150] The UN Declaration says

[148] *Ireland* (n 1) 59 [167] (the Court).

[149] United Nations General Assembly Resolution 3452 (XXX) of 9 December 1975 ('UN Declaration'). Article 1 of the declaration states that:

> 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

The Declaration offers no definition of cruel, inhuman or degrading treatment or punishment.

[150] *Greek Case* (n 55); see Rodley, NS, 'The Definition(s) of Torture in International Law' (2002) 55 *Current Legal Problems* 467.

that '[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. This is a form of words taken from the *Greek Case*, which then 'fed directly back into the Convention case law' in *Ireland*.[151] While the UN Declaration does provide limited support for the 'severity of suffering' approach, it is of little broader relevance. In order to understand this, it will be necessary to refer to the *Greek Case* in more detail below.

Second, and most importantly, the UN Declaration contained a very different textual provision, much narrower than Article 3. Therefore it was not analogous. Where the UN Declaration limits torture to treatment inflicted 'by or at the instigation of a public official', this is not a feature of Article 3, which does not restrict the type of person that may commit torture and inhuman or degrading treatment. The rhetoric used during the drafting of the European Convention confirms that the delegates expressly contemplated the application of Article 3 to ill-treatment by private citizens as well as by public officials.[152] Further, Article 3 makes no mention of particular prohibited purposes. Indeed the drafters of the Convention had intended it to prohibit ill-treatment regardless of the purpose for which that treatment was inflicted.[153] On the other hand the UN Declaration, like the UN Convention that later followed it, necessarily adopts a narrow, state-centric view

[151] Rodley (n 150) 471-2.

[152] See, e.g., the draft resolution proposed by Mr Cocks: 'The Consultative Assembly solemnly declares that any use of torture **by public authorities or individuals** is a crime against humanity and can never be justified…' (emphasis added); see Preparatory Work 1956 (n 81) 9-10:

[153] See, e.g., draft resolution proposed by Mr Cocks: '…this prohibition must be absolute and that torture cannot be permitted **by any purpose whatsoever**….' (emphasis added): ECHR Travaux (n 3) vol I, 118; also quoted in Preparatory Work 1970 (n 137) 5.

of torture committed by public officials for law-enforcement purposes.[154] Article 3 of the European Convention has much broader aims and there was no evidence of an intention to limit it in this way.

(iii) The Greek Case supports a holistic application of Article 3

The preceding discussion reveals that the hierarchy at the heart of the *Ireland* Case had its unacknowledged origin in the decision of the European Commission in the *Greek Case.* The *Greek Case* does establish the proposition that torture is an aggravated or, to use Judge O'Donoghue's expression in *Ireland*, 'a more severe type of inhuman treatment.'[155] But no support may be found in the *Greek Case* for the proposition that there is a difference in stigma between the two grades of ill-treatment.

The Commission said there was significant overlap between the concepts enshrined in Article 3. The Commission stated that 'it is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.'[156] It perceived the concepts as existing on an almost quantitative spectrum, with degrading treatment at the lower end and torture at the apex.[157] The Commission also thought there were

[154] Although note that the use of the words 'such as' in UNCAT Article 1 may indicate that the list of purposes therein is an inclusive rather than an exclusive list: on this point, see Rodley (n 150) 491.

[155] *Ireland* (n 1) 97 (O'Donoghue J).

[156] *Greek Case* (n 55) 186 [2].

[157] See Arai-Yokoi, Y, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385.

qualitative characteristics of the different types of ill-treatment: the purposive requirement for torture; severe suffering for inhuman treatment; and gross humiliation for degrading treatment. Having defined the particular terms and described their overlapping relationship, the Commission implicitly said that distinguishing between them was unnecessary, by using the expressions 'torture or ill-treatment' throughout. In the final outcome the Commission found that both torture *and* ill-treatment had been established. Torture, inhuman treatment and degrading treatment were regarded as inextricably bound up with one another, and since all forms were absolutely prohibited there was no need to determine precisely where the thresholds between each concept lay. This holistic approach finds support in the position of the United Nations Human Rights Committee that the distinctions between the different concepts protected by Article 3 need not be 'sharp'.[158] Thus the Commission in the *Greek Case* understood Article 3 to embody a series of concepts which were sliding, interrelated, and above all, not dichotomous.

Perhaps the most important aspect of the decision in the *Greek Case* was that the Commission did not itself differentiate between the level of protection, or the type of 'stigma' to which the different concepts in Article 3 gave rise. There was simply no suggestion that different consequences—reputational or otherwise—might attach to a different classification of ill-treatment.

[158] UN Human Rights Committee, CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) October 3, 1992, [4].

The *Ireland* Court did not, of course, refer to the *Greek Case* per se.[159] This was regrettable, since it was at that time the only available precedent and contained a lengthy discourse on Article 3. But it is clear from the preceding discussion that the Court was incorrect to suggest that the 'thinking lying behind' the UN Declaration, which is found in the *Greek Case*, supported a severity spectrum. This case provided no support for a different type or level of stigma. Indeed it seems the *Ireland* Court both misrepresented, and misapplied, the thinking lying behind the UN Declaration. This would ultimately allow for different legal consequences to attach to torture, and inhuman or degrading treatment.

More attention was paid to the *Greek Case* in the dissenting opinions. Judge O'Donoghue, a member of the Sub-Commission in the *Greek Case*,[160] said that the approach the *Greek* Commission adopted in considering the terms of Article 3 holistically was a 'reasonable one'. Although he accepted that torture 'is, of course, a more severe type of inhuman treatment', nevertheless he adhered to the approach in the *Greek Case* in holding that the five techniques 'constituted a practice of inhuman treatment **and** torture in breach of Article 3'.[161] Judge Matscher's approach was similar. He adopted the description in the *Greek Case* of the 'essential elements of Article 3', and accepted there were distinguishing features between torture and inhuman and degrading treatment.[162] However he would have rejected any

[159] Otherwise than in connection with the burden of proof; see *Ireland* (n 1) 57 [161] (the Court).

[160] See ibid 95 (O'Donoghue J).

[161] ibid 96 (O'Donoghue J).

[162] ibid 126 (Matscher J).

stigmatic differentiation; saying that in some senses 'torture is in no way a higher degree of inhuman treatment.'[163]

Conclusions

The *Ireland* Court was wrong to divide Article 3 into a hierarchical protection, with a 'special stigma' reserved for torture alone. This is so for three reasons.

First, the conclusion of the Court was based on flawed premises. The Court's 'special stigma' could arguably have been justified by the ordinary meaning of the words. Yet the ongoing definitional debates, including between the members of the Commission and the Court, suggest that an 'ordinary' meaning for the terms in Article 3 is elusive. The other bases for the majority decision, including the intention of the Convention's drafters and a General Assembly resolution, provide scant support for the distinction. The authorities which the Court relied upon ought not to have been deployed to this end.

Second, the majority opinion was wrong as a matter of procedure. They were wrong to disagree with the unanimous opinion of the Commission that a practice of torture and ill-treatment had been established. That finding of the Commission was not contested by either party, and the Court did not have the benefit of hearing oral argument on this point. The Court's notion of a 'special stigma' for ill-treatment crossing the torture threshold was not advanced before it.

[163] ibid.

Further, the Commission was in a better position than the Court to make findings of fact with respect to the severity of suffering caused by the five techniques. Delegates of the Commission spent 34 days in total hearing evidence from more than 119 witnesses in highly secretive proceedings occurring in an air base in Norway.[164] The parties' submissions on the oral evidence alone lasted an entire week, and a further three days were devoted to oral argument on the law.[165] The transcript of the proceedings, only recently made public, totalled 14 volumes and 4,500 pages.[166] If ever there were a case to defer to the opinion of the first instance tribunal, this would have been it.

The Court's determination that it had jurisdiction to review the Commission's decision on both the facts and the law was significant. It was noted by commentators at the time that the Convention gave no guidance on the relationship between these organs.[167] A much greater degree of deference to the Commission's fact-finding role was displayed in later cases. Indeed, the Grand Chamber said in *Tanrikulu v Turkey* said that, although the Court retains the power to make its own assessment of the facts, it is only very exceptionally that it will exercise that power.[168]

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[164] *Ireland v United Kingdom* App no 5310/71 (ECommHR, January 25, 1976) 6.

[165] ibid.

[166] A helpful summary, along with details of later interviews conducted with survivors of the five techniques, is available in Conroy, J *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (University of California Press 2001); see also O'Boyle (n 28).

[167] Spjut (n 103) 269.

[168] *Tanrikulu v Turkey* (2000) 30 EHRR 950 (GC) [67]; see also *Akdivar v Turkey* (1997) 23 EHRR 533; *Mahmut Kaya v Turkey* (1999) 28 EHRR 1; compare *Cruz Varas v Sweden* (n 10) [73]-[76], where the Court reached a different conclusion to the Commission regarding the credibility of a witness whom they had not themselves heard.

The third error in the majority judgment follows from the second. The Court was wrong in its substantive assessment of the facts. Applying the Court's own standard, according to which torture is 'deliberate inhuman treatment causing very serious and cruel suffering',[169] the five techniques clearly met that standard. There was ample evidence of the severe suffering experienced by the victims and of the deliberate application of cruel sanctions for the requisite purpose. With the passage of time, their suffering went on: survivors from the *Ireland* Court's 'illustrative cases' sustained ongoing and serious physical and psychological injuries.[170] They were treated in psychiatric hospitals, suffered anxiety, depression, alcoholism and some became violent. Many reported nightmares, feelings of impending fatality, extreme sensitivity to light and noise, and many died young.[171] Their mental injuries continued long after the physical suffering had ceased and, with the benefit of hindsight, it seems the Court seriously underestimated their suffering.

These three concerns reinforce the inconsistency between the *Ireland* hierarchy and the principle animating Article 3. As Luban has argued, the concepts of torture, inhuman and degrading treatment share 'an essential continuity'.[172] With reference to the prohibitions in UNCAT and common Article 3 of the Geneva Conventions, he argues that 'torture and humiliation without torture belong together as forms of abuse; the falsehood comes when we imagine that there is a sharp distinction between them just because they are banned by different clauses of

[169] *Ireland* (n 1) [167] (the Court).

[170] Conroy (n 166).

[171] ibid 188-198.

[172] Luban, D, 'Human Dignity, Humiliation, and Torture' (2009) 19 *Kennedy Institute of Ethics Journal* 211, 222.

the treaties.'[173] In the case of Article 3, this latter qualification does not apply: the concepts are banned by the very same clause of the treaty.

Other bases for a hierarchical conception of Article 3 might have been sought, perhaps in moral theory, but none were offered. It is argued that 'the Court allowed its concern with the consequences of its decision to determine its definition of torture'.[174] This is a clear example of a hard case making bad law.

By positioning torture and ill-treatment on a virtual spectrum of severity, with two definitional thresholds (first to fall within Article 3, and second to distinguish inhuman treatment from torture), the Court laid the foundation for what would become permeable outer parameters for Article 3. As Evans and Morgan have argued:

> Approaching Article 3 in this manner also has the paradoxical effect of lessening the impact of the finding that it has been breached: the conclusion that a person has been treated in a fashion which, although degrading and even inhuman, is not sufficiently serious as to amount to torture, tends to place the emphasis upon what has not been done, rather than upon what has. Yet inhuman or degrading treatment or punishment is as great a violation of Article 3 as is torture. Even if the Commission and Court are correct in seeking to differentiate between these terms of the basis of severity of suffering, there should be no suggestion that a degrading or inhuman act is any less serious. (…) The reality, however, is that it is not. Indeed, how can it be, when a degree of opprobrium needs to be reserved for the more 'severe' form of treatment?[175]

[173] ibid.

[174] Spjut (n 103) 271. This position is also adopted by Cullen (n 70) 40.

[175] Evans and Morgan (n 138) 97-8.

The Court's decision in *Ireland* was a major influence upon the drafters of the UN Convention Against Torture.[176] During the drafting of the UNCAT, the question of whether 'torture' and 'cruel, inhuman or degrading treatment or punishment' were legally distinct notions was the subject of extensive debate.[177] This suggests that, even after the decision of the *Ireland* Court in 1979, there was ambiguity about whether the concepts were different in relevant respects. The result of these debates was that UNCAT not only adopts, but further extends, the distinction between torture and other, lesser forms of ill-treatment such as cruel, inhuman or degrading treatment or punishment. With 150 States parties[178] the UNCAT is one of the most widely ratified treaties in the UN library. It is thus especially significant that UNCAT's protection is segregated into two tiers, with many obligations applying only to torture but not to 'cruel, inhuman or degrading treatment or punishment.'[179] These include: the obligation to criminalise torture,[180] as well as complicity in torture, attempted torture, and aiding and abetting torture;[181] the obligations to ensure redress and to compensate victims;[182] the obligations to provide broad jurisdiction over offences of torture[183] and to render torture an extraditable

[176] An excellent summary of the debates over Article 1 of the Convention, including the difference of opinion between Amnesty International, the International Commission of Jurists, and the UK as to whether to preserve the 'relative intensity of suffering' may be found in Rodley (n 150) 474-575.

[177] See Novak, M. and McArthur, E., *The United Nations Convention Against Torture* (OUP 2008) 66-69.

[178] 150 parties, 78 signatories, United Nations Treaty Collection, www.treaties.un.org [accessed 19 June 2012].

[179] Defined in Article 16 of the UNCAT (n 19).

[180] See Rodley and Pollard (n 60).

[181] UNCAT (n 19), Article 4(1).

[182] ibid Article 14.

[183] ibid Article 5.

offence.[184] The failure to extend these obligations to ill-treatment falling short of torture entrenches the two-tiered approach from *Ireland.* In this way, 'whilst the ECHR draws these concepts [of torture and inhuman or degrading treatment or punishment] together, the UNCAT tends to drive them apart.'[185]

The UNCAT has, in turn, influenced the development of the jurisprudence of the European Court, as well as other international and regional bodies. International criminal law too has adopted different conceptions of criminal responsibility for torture and cruel, inhuman or degrading treatment.[186] Though the Court was not required by the broader terms of its torture provision to include a purposive requirement, such a requirement has been effectively imported into its case law.

It is this distinction between torture and other lesser forms of ill-treatment which has paved the way for the abuse by states of the second tier concepts of inhuman or degrading treatment. The Special Rapporteur for Torture has observed that:

> An increasing number of Governments, in the aftermath of 11 September 2001 and other terrorist attacks, have adopted a legal position which, while acknowledging the absolute nature of the prohibition of torture, brings the absolute nature of the prohibition of cruel, inhuman or degrading treatment or punishment into question. In particular, it is argued that certain harsh interrogation methods falling short of torture might be justified for the purpose of extracting information aimed at preventing future terrorist acts that might kill many innocent people.[187]

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[184] ibid Article 8.

[185] Evans, MD 'Getting to Grips with Torture' (2002) 51 *International & Comparative Law Quarterly* 365, 369.

[186] See report of the Special Rapporteur for Torture, quoted in Evans, MD, 'Torture (editorial)' [2006] *European Human Rights Law Review* 101, 108.

[187] ibid.

As has been noted in the context of the US, the Bush Administration has 'framed the debate in this way: torture is wrong, and we do not do it, but we use "tough" tactics that are both lawful and justified under the circumstances.'[188] The Convention—and the *Ireland* case before it—open the possibility that there might be a way 'of justifying violent interrogation or punishment that is illegal but does not rise to the level of "torture".'[189] In this way, 'the administration's public statements did not ignore international law; they followed its structure precisely.'[190]

The result from the *Ireland* and *Greek* cases is that there are two important thresholds on the severity spectrum of Article 3. The first threshold is that between ill-treatment which is unlawful and objectionable but no so serious as to amount to a breach of Article 3 (to use the language of the Commission in the *Greek Case*, 'permissible roughness of treatment'). Following Evans, this will be termed the 'entry threshold'.[191] The Commission said that:

> It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. Such roughness may take the form of slaps or blows of the hand on the head or face. This underlies the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.[192]

The second threshold is that between ill-treatment in breach of Article 3 but not of the particular intensity or cruelty as to constitute torture, or (perhaps) ill-

[188] Parry, J, *Understanding Torture: Law, Violence, and Political Identity* (University of Michigan Press 2010) 4.

[189] ibid 6.

[190] ibid.

[191] Evans (n 185) 371.

[192] *Greek Case* (n 55) 501.

treatment which does cause that degree of severe suffering but which does not satisfy the Court's requirement of a purpose 'to extract information or a confession'.[193] This will be referred to as the 'torture threshold.' The next part of this thesis traces the influence of those thresholds across the new frontier of the Court's Article 3 case law.

[193] There is some debate over whether or not this purposive element is, or need be, a requirement of torture under the European Convention, even if it is a requirement under other international and regional treaties. See, e.g., Nowak, M, and E McArthur, 'The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment' (2006) 16 *Torture* 147; compare Rodley (n 150).

PART B: THE EXPANDED AMBIT AND DILUTED PROTECTION OF ARTICLE 3

Introduction

The *Ireland* hierarchy has materially contributed to two inter-linked developments, which are explored in this Part. The first is a growth in the subject matter to which Article 3 applies, stemming from the inclusivity of the Court's interpretation of the terms 'inhuman or degrading treatment'. This development, discussed in section 1 below, will be called the 'elasticity of the entry threshold'. The second development, which is corresponding and to some extent correlative, is a dilution in the potency of Article 3. This dilution has been achieved by the Court's use of limiting devices in its Article 3 case law. This thesis will show, by reference to five expository cases, that the protection of Article 3 has been diluted. These cases have been isolated for examination here because they crisply demonstrate the two developments and the way they interrelate. This Part seeks to demonstrate a link between the expanded second tier of the *Ireland* hierarchy and the Court's use of limiting devices.

1. The expanded ambit of Article 3

It was noted in the Introduction that the number of violations of Article 3 found by the Court has increased significantly in recent years. The increasing number of violations of the Convention is not unique to Article 3, but it has outpaced the increase in violations of other Articles of the Convention.[194] The relative importance of Article 3 has therefore significantly increased. In the annual statistics published by the Registry of the Court, Article 3 case law is organised into three categories: torture; inhuman and degrading treatment; and the lack of an effective investigation.[195] The statistics for the years 2007 to 2011 (inclusive) reveal that it is the latter two categories that account for the increase in Article 3 violations. While there was virtually no change in the number of torture violations found by the Court over this period, the two categories of ill-treatment jointly saw a 230% increase.

This increase has occurred in the second tier of the *Ireland* hierarchy: cases of inhuman or degrading treatment. The result is that Lord Justice Laws' 'paradigm case'[196] of torture at the hands of state agents now reflects a very small percentage of cases decided under Article 3. It is now well established that Article 3 may be engaged by the proportionality of sentences with underlying offences;[197] the legitimacy of solitary confinement;[198] or the unfairness of using shackles on a

[194] See ECHR Annual Reports 2007-2011 (n 23).

[195] ibid.

[196] *Secretary of State for the Home Department v Limbuela* [2004] Q.B. 1440 (CA) [77] (Laws LJ); see O'Cinneide (n 54) 595.

[197] See, e.g., *Kafkaris v Cyprus* (n 47); *Harkins* (n 47); *Vinter* (n 47), and many others.

[198] See, e.g., *Ramirez Sanchez v France* (2007) 45 EHRR 49 (GC); *Babar Ahmad* (n 76).

prisoner.[199] The Court has said that Article 3 could, in principle, apply to discrimination against a sexual or racial minority.[200] It could also apply to the suffering occasioned by a homeless man on his release from prison;[201] the 'level of financial benefits available under a social assistance scheme'[202] and the extremity of material poverty;[203] to the unreasonable repeated refusal of authorities to provide tests for foetal abnormality to a pregnant woman within the window for a legal abortion;[204] the failure of doctors to obtain informed consent to a sterilisation procedure;[205] 'the absence of an adequate supply of toilet paper in a prison';[206] the

[199] See, e.g., *Raninen v Finland* (1998) 26 EHRR 563; *Herczegfalvy v Austria* (1993) 15 EHRR 437; *Henaf v France* (2005) 40 EHRR 44.

[200] In *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [121] the Court said it 'would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3'.

[201] In *O'Rourke v United Kingdom* (n 51) [2], where the Court said that the level of suffering experienced by the applicant did not reach 'the requisite level of severity to engage Article 3'. Evan had it done so, the authorities had done enough to discharge their responsibility by making arrangements for temporary housing so that '[t]he applicant was therefore largely responsible for his own deterioration following his eviction'.

[202] *Larioshina v Russia* (n 51). See also *Budina v Russia* App no 45603/05 (ECtHR, 18 June 2009) (admissibility) 5-6, where the applicant complained under Article 2 that the amount of her pension was so low that she was unable to live. The Court considered her complaint under Article 3, and did not 'exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent upon state support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.'

[203] In *MSS v Belgium and Greece* (2011) 53 EHRR 2 (GC) [262] the Court held that the applicant's extreme poverty as an asylum seeker in Greece, with no access to housing or sanitation and constant fear of robbery and violence was degrading, especially when considered in light of the prolonged uncertainty and lack of prospects for future change.

[204] *RR v Poland* (2011) 53 EHRR 31.

[205] *VC v Slovakia* App no 18968/07 (ECtHR, 8 November 2011).

[206] *Valasinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001).

forced shaving of a prisoner's head;[207] and living conditions in a social care home.[208] Article 3 has begun to embody a cluster of rights and obligations, including some positive duties and other negative restraints.[209]

These are just a few examples of the expansion of the Court's case law on positive obligations under Article 3. The entry threshold, or minimum level of severity for engaging Article 3, has stretched to accommodate this expansion. This reflects a growing trend towards the further development and substantiation of positive obligations.[210] It is a trend that carries significant consequences for Contracting States, as the areas that are open to European supervision expand. It also carries legal consequences for the strength of the protection that Article 3 affords.

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[207] In *Yankov v Bulgaria* (2005) 40 EHRR 36, [112] the Court appeared to base its finding of degrading treatment on the 'forced change of the person's appearance by the removal of his hair' causing 'a feeling of inferiority'. While the suggestion that head shaving without more could be regarded as degrading is questionable, in fact there was other evidence of poor detention conditions, such as the lack of light, unsanitary toilet facilities, the tiny cell and the lack of medical treatment for thrombosis which he sustained in prison. The Court was arguably influenced by these factors, as well as the fact that he was detained in breach of Article 5, in reaching its finding that the treatment was degrading. It is unfortunate that the judgment disproportionately emphasised the head-shaving.

[208] *Stanev v Bulgaria* (n 49).

[209] The cases of *Airey v Ireland* (1979-1980) 2 EHRR 305 (Art 6) and *X and Y v Netherlands* (1986) 8 EHRR 235 first established the principle that positive obligations may arise from the Convention rights. This was then adopted in the context of Article 3 (taken together with Article 8) in *MC v Bulgaria* (2005) 40 EHRR 20, and has expanded significantly since.

[210] See, e.g., Mowbray, AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); Palmer, E, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 *Erasmus Law Review* 397; Lawson, A, 'Disability, Degradation and Dignity: The Role of Article 3 of the European Convention on Human Rights' (2005) 56 *Northern Ireland Legal Quarterly* 462.

2. *Soering v United Kingdom*

The first expository case is the 1989 decision of *Soering v UK.*[211] *Soering* is interesting because the Court expanded the ambit of Article 3 to a new area, namely, extradition. Extradition would engage the responsibility of the sending state where there was a real risk of ill-treatment contrary to Article 3 in the receiving state. The Court said that protection applied equally to both tiers of the *Ireland* hierarchy. However, simultaneously the Court introduced the language of fair balance and proportionality, diluting the strength of that protection.

The decision

Soering was an 18-year-old German student at the University of Virginia who was accused of murdering his girlfriend's parents. Having fled the country he was later arrested in the UK. The US and Germany both requested the applicant's extradition, the US asserting jurisdiction on the basis that the crime occurred on its territory, and Germany asserting jurisdiction on the basis of the defendant's nationality. The UK sought to extradite him to the US, and he challenged the deportation order. He argued, inter alia, that his exposure to the 'death row phenomenon' if convicted would subject him to inhuman and degrading treatment.[212]

The UK refuted this challenge on two bases. The first was that any purported ill-treatment suffered by the applicant on death row would not engage the

[211] *Soering* (n 17).

[212] ibid [103]. The applicant accepted that, by virtue of the clause in Article 2, the death penalty was not *per se* contrary to the Convention. Amnesty International intervened to argue that a prohibition on the death penalty was now implied in the Convention, but the Court rejected that argument.

responsibility of the UK. Article 3 had no extraterritorial application, since it was not the authorities of the sending state that would be inflicting the putative ill-treatment. The second basis was offered in the alternative. If the Court were to accept the extraterritorial application of Article 3, a sending state could only be held responsible in circumstances where the ill-treatment suffered abroad was 'certain, imminent and serious'.[213]

Rejecting the UK's challenge, the Court unanimously held that it would be incompatible with 'the underlying values of the Convention' for a Contracting State 'knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed'.[214] The Court effectively read into Article 3 of the European Convention the rule contained in Article 3(1) of the UNCAT.[215] Significantly, the UNCAT provision does not apply to cruel, inhuman or degrading treatment.[216] But the European Court did not stop there, declaring that 'this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.'[217] Not only did the

[213] ibid [83].

[214] ibid [88].

[215] UNCAT (n 19) Article 3(1) reads: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

[216] But see general comments of the UN Committee Against Torture which attempt to plug the gap, e.g., 'General Comment No 2: Implementation of Article 2 by States Parties' UN Doc.CAT/C/GC/2 (24 January 2008). See also Rodley, NS, 'Reflections on Committee against Torture General Comment No. 2' (2007) 11 *New York City Law Review* 353.

[217] *Soering* (n 17) [88].

Court extend the protection to both tiers of the *Ireland* hierarchy, but it rejected the UK's proposed limitations relating to the certainty and imminence of the harm. This was a powerful statement from which the Court has repeatedly been urged by the UK to retreat.[218]

Expansive statements of principle

The *Soering* decision expanded the application of Article 3 in several important respects. First, it held that Article 3 implicitly contains an obligation upon member states not to extradite.[219] The Court held, quite sensibly, that that obligation extends to both tiers of the *Ireland* hierarchy. Had they held, as the UK urged, that only the risk of torture would operate to prevent an extradition, the Court would have been required to engage in highly problematic analysis about exactly where on the severity spectrum the prospective ill-treatment was likely to fall. The *Soering* Court avoided that difficult by applying the principle uniformly across both tiers of the *Ireland* hierarchy. The Court's boldness in *Soering* stands in contrast to its more limited findings in the context of evidential issues. Faced with the question of whether evidence obtained by Article 3 ill-treatment ought to be admissible in criminal proceedings, the European Court in *Jalloh,*[220] *Gäfgen*[221] and *Abu Qatada*[222]

[218] In *Chahal v United Kingdom* (1997) 23 EHRR 413; *Saadi v Italy* (2009) 49 EHRR 30 (GC) and others.

[219] This position was then, and remains, controversial. On the extraterritorial effect of the Convention see, e.g., Lawson, R 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83-124.

[220] *Jalloh v Germany* (2007) 44 EHRR 32 (GC).

[221] *Gäfgen v Germany* (2011) 52 EHRR 1 (GC) (Gäfgen).

[222] *Abu Qatada* (n 76).

left the door open for a lesser standard of protection to apply in respect of evidence obtained by inhuman or degrading treatment as opposed to evidence obtained by torture.

The *Soering* decision laid the foundations for a major expansion in Article 3 case law, conferring upon the European Court a supervisory role with respect to extradition even where the receiving State is outside the Council of Europe, and even where the harm is 'speculative' or 'prospective'. In the face of significant controversy and political pressure,[223] the application of Article 3 in the expulsion context was affirmed by the Grand Chamber in *Chahal v UK*[224] and again in *Saadi v Italy*.[225] This affirmation was made despite the post 9/11 environment of heightened security, even in respect to the deportation of terrorists. Those cases represented a shift away from the balancing language used in *Soering*, with the *Chahal* Court stating that there is no 'room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged'.[226]

The extraterritorial application of Article 3 was later extended beyond extradition to expulsion more generally in *Cruz Varas v Sweden*;[227] to *refoulement* of

[223] See the discussion of the various political and diplomatic attempts to get around these obstacles to extradition in Moeckli, D, 'Saadi v Italy: The Rules of the Game Have Not Changed' (2008) 8 *Human Rights Law Review* 534.

[224] *Chahal v United Kingdom* (n 218).

[225] *Saadi v Italy* (n 218).

[226] *Chahal v United Kingdom* (n 218) [81].

[227] *Cruz Varas v Sweden* (n 10).

refugees in *Vilvarajah v UK*[228] and *Ahmed v Austria;*[229] to 'second-degree' expulsions (where there are substantial grounds for believing there to be a real risk that the receiving State will expel the person to another State, where that person might face treatment contrary to Article 3) in *MSS v Belgium and Greece*;[230] and to expulsions on the high seas in *Hirsi Jamaa v Italy*.[231] In the recent cases of *Babar Ahmad*[232] and *Harkins and Edwards*[233] the Court stated categorically 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.'[234]

The *Soering* decision also laid the foundations for the application of Article 3 in three further contexts. The first two are criminal sentencing and prison conditions, and since they arose from the same statement of principle they will be considered together here. The Court said unanimously that, although the death penalty was not *per se* unlawful, an Article 3 problem could arise in a death penalty context by reason of '[t]he manner in which [a death sentence] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution'.[235] This represented the beginning of a long line of cases on the proportionality of criminal sentences and living conditions in detention

[228] *Vilvarajah v United Kingdom* (1992) 14 EHRR 248.

[229] *Ahmed v Austria* (1997) 24 EHRR 278.

[230] *MSS v Belgium and Greece* (n 203).

[231] *Hirsi Jamaa v Italy* (n 76).

[232] *Babar Ahmad* (n 76).

[233] *Harkins* (n 47).

[234] *Harkins* (n 47) [120]; *Babar Ahmad* (n 76) [168].

[235] *Soering* (n 17) [104].

facilities, domestically as well as in expulsion contexts.[236] The question in criminal sentencing cases, as will be explained further below, is not whether a restriction on the Article 3 right is proportionate. Rather, gross disproportionality between a criminal sentence and the underlying offence is *itself* held to be a violation of Article 3: a freestanding ground on which inhuman or degrading treatment may be established.[237]

The last context in which the *Soering* decision expanded the application of Article 3 was in relation to the interaction between expulsion and the Article 6 right to a fair trial. The applicant had argued that the lack of available legal aid on death row in Virginia would affect his ability to pursue certain appeals and thus his extradition would breach Article 6. Although the Court did not accept this argument in his case, it acknowledged that 'an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.'[238] Not every prospective breach of Article 6 will entail the responsibility of the sending state under the Convention, but particularly grave or 'flagrant' breaches might have that effect. As will be seen in the discussion of *Abu Qatada* below, this statement paved the way for extradition challenges based on Article 6 of the Convention.

[236] On the proportionality of criminal sentences, including life sentences, see, e.g., *Weeks v United Kingdom* (1988) 10 EHRR 293; *V and T v United Kingdom* (2000) 30 EHRR 121; *Leger v France* (2009) 49 EHRR 41 and discussion in Van Zyl Smit, D, and Ashworth, A, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 *Modern Law Review* 541, 548. On the appropriateness of detention in light of medical conditions, see, inter alia, *Price v United Kingdom* (2002) 34 EHRR 53; *Slawomir Musial v Poland* (2009) App no 28300/06 (ECtHR January 20, 2012); *Aleksanyan v Russia* (n 48).

[237] Van Zyl Smit, D and Ashworth, A, ibid.

[238] *Soering* (n 17) [113].

Limiting Devices

Having set out these broad principles, the *Soering* Court said that 'inherent in the whole of the Convention' was the search for 'a fair balance' between the 'general interests of the community' and the protection of individual rights.[239] This was problematic. In fact, the absence from Article 3 of a limitation clause for actions which are 'necessary in a democratic society' suggests that the Article 3 is one of very few provisions of the Convention where there was *not* intended to be a 'search for a fair balance'. It will be recalled from the *travaux preparatoires* that the delegates at the drafting conference thought that not even the survival of the state itself could justify treatment contrary to Article 3. The drafters therefore implicitly repudiated any notion of balancing in the context of that Article. Indeed, 'judicial recognition of an implicit balancing principle in the Convention [even in the context of qualified rights] was controversial from its inception.'[240]

The *Soering* Court went on to say that the policy-based objectives of extradition were relevant to the assessment of whether the minimum level of severity had been reached. The Court's reference to the desire to bring fugitives to justice and to prevent the development of international 'safe havens'[241] hinted at the first limb of a proportionality analysis, namely legitimate objectives. Further, the Court said that neither 'the horrible nature of the murders with which Mr Soering is charged', nor the 'legitimate and beneficial role of extradition arrangements in

[239] ibid [89].

[240] Mowbray, AR, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 289, 291.

[241] *Soering* (n 17) [89].

combating crime'[242] would be overlooked in its assessment. The Court appeared to accept that extradition agreements were an appropriate means of fulfilling legitimate objectives, but nevertheless concluded that the suffering that would be occasioned on death row was too great to deny the application of Article 3. The Court said that the fact the legitimate objective of punishing a fugitive could be accomplished by Soering's extradition to Germany while avoiding 'the risk of intense and protracted suffering on death row', was 'a circumstance of relevance for the overall assessment under Article 3.'[243] This recalls the third limb of the proportionality doctrine, which has been summarised colloquially as whether a sledgehammer is being used to crack a nut.[244] In effect, the *Soering* Court found that while extradition to the US would have pursued a legitimate objective, the same objective could have been achieved through means that were less restrictive on the right. The Court expressly considered the overall 'proportionality of the contested extradition decision.'[245] The Court's use of the language of balancing, and its implicit references to parts of the proportionality test, raise questions about the appropriateness of that analysis in the context of the ostensibly absolute Article 3.[246]

[242] ibid [110].

[243] ibid [110].

[244] See, e.g., Rivers, J, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174.

[245] *Soering* (n 17) [110].

[246] It has been argued elsewhere that decisions about the scope of human rights inevitably involve balancing considerations. See, e.g., Tsakyrakis, S, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Khosla, M, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 *International Journal of Constitutional Law* 298. See, also Palmer, S, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 Cambridge Law Journal 438, 447-448.

Following *Soering,* the language of balancing has arisen in the context of deporting non-citizens with serious medical conditions.[247] The Grand Chamber in *N v UK* cited the 'fair balance' passage from *Soering* with approval.[248] The majority went on to hold that deportation of an HIV-positive woman to Uganda, where she would not have access to appropriate care and would likely suffer an imminent decline and early death, did not violate Article 3.[249] Mantouvalou argues persuasively that the real rationale for this decision was consequentialist, with the Court relying on what is usually called a '"floodgates argument".'[250] In both *Soering* and *N v UK* the Court uses language of balancing and proportionality in the Article 3 context to hint at the prospect of limiting the scope of the right.[251]

Conclusions from Soering

The *Soering* limitations, based on the 'proportionality of the contested extradition' and the need for a 'fair balance' between community interests and individual rights, are inconsistent with the fundamental importance that the Court notionally accords to the prohibition embodied in Article 3. These limitations are difficult to reconcile with the non-derogable and unqualified status of Article 3 and the principle that its protection should apply regardless of the victim's conduct and the other interests

[247] See, e.g., *D v United Kingdom* (1997) 24 EHRR 423; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *N v United Kingdom* (2008) 47 EHRR 39 (GC).

[248] *N v UK* (n 247) 44.

[249] ibid [49]-[50] (the Court).

[250] Mantouvalou, V, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *Modern Law Review* 815, 816.

[251] Lawson and Mowbray argue that the doctrine of proportionality may be applicable in the context of positive obligations under Article 3. See Lawson, A, 'Disability, Degradation and Dignity: The Role of Article 3 of the European Convention on Human Rights' (2005) 56 *Northern Ireland Legal Quarterly* 462; Mowbray (2010) (n 240) 307.

that might be at stake. As the Grand Chamber said in the later case of *Gäfgen v Germany,* Article 3 'has been framed in unambiguous terms, [and it] recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult.'[252] Yet, after extending the application of its Article 3 jurisprudence to extradition, criminal sentencing, and conditions of detention, the *Soering* Court immediately qualified those extensions by using balancing language.[253] As one commentator rightly observed, the Court's 'trumpeted extension of protection is unlikely to come without a silent escape.'[254]

3. *Gäfgen v Germany*

The second expositive decision is *Gäfgen v Germany*.[255] The case concerned the admissibility of evidence obtained in breach of Article 3. Here the critical issue was the interaction between Articles 3 and 6 of the Convention. In effect, the Grand Chamber held that Article 6 would only be violated where there was a causal relationship between the torture-tainted evidence and the ultimate verdict. This conclusion is highly problematic. But it was necessary because of the breadth of conduct which, since adoption of the *Ireland* hierarchy, is now encompassed by the terms 'inhuman and degrading'. The Grand Chamber's reluctance to apply the exclusionary rule equally across both tiers of the *Ireland* hierarchy forced it to retreat behind the questionable concept of causation.

[252] Gäfgen (n 221) [107].

[253] See also Scott, C, 'Saadi v. Italy: Preventing Deportation under Article 3 and National Security Concerns: The European Court of Human Rights Struggles to Find a Balance' (2008) 17 *Tulane Journal of International and Comparative Law* 601.

[254] Battjes, H, 'Soerings's Legacy' (2008) 1 *Amsterdam Law Forum* 139, 148.

[255] *Gäfgen* (n 221).

The decision

Gäfgen was convicted of kidnapping with extortion and murder. He lured a 12 year old boy to his apartment, suffocated him and disposed of the body. Having collected a ransomed sum from the boy's parents, Gäfgen was arrested attempting to flee the country. In his initial police interrogation he said the boy was alive and being held by two other kidnappers, but repeatedly refused to disclose the location. Believing the boy's life to be in grave danger, and in the face of the applicant's continued resistance to police questioning, the Deputy Chief of the Frankfurt police authorised an officer to threaten Gäfgen with considerable pain, and to inflict that pain if necessary. The authorisation was documented in police files, and was taken in defiance of explicit orders to the contrary by the Deputy Chief's superiors.

It was common ground in the proceedings that the applicant was threatened with considerable pain which was going to be inflicted under medical supervision. Gäfgen also alleged that he was pushed in the chest, shaken so that his head hit the wall, and threatened with sexual abuse, though the latter allegations were not proven. A mere ten minutes after the threats, Gäfgen made a full confession and told police where the body was located.

The applicant's pre-trial confessions were excluded from the evidence at his criminal trial. However, the Frankfurt court held that the so-called 'real' evidence (that is to say, the physical evidence, or the 'fruits of the poisoned tree') obtained as a result of the confession—in particular, the body of the dead child—was admissible in evidence against him. This was significant because in its absence a murder charge

may have been difficult to sustain. On the second day of the trial, after being informed that none of his previous confessions were admissible against him, but having lost his application to exclude the real evidence, Gäfgen gave a partial confession in the witness box. He admitted that he had suffocated the boy following the abduction but denied planning to do so. At the conclusion of the trial he made a full confession, citing his remorse and desire to take responsibility for the crime. He was convicted and sentenced to life imprisonment.

Expansive statements of principle

The Grand Chamber found that the threats issued to Gäfgen were inhuman and degrading but not torture. In reaching this decision, the Court said that the severity spectrum applies equally to mental and physical torture. The Court set out a list of factors relevant to assessing the intensity of mental suffering. They were: the duration of the threatening treatment (in this case, ten minutes);[256] evidence of fear and anguish, including the apparent absence of any long-term psychological consequences for the applicant;[257] the intentional and premeditated nature of the threat;[258] and the fact that the applicant was in a vulnerable position, being handcuffed in police custody.[259] The Court also observed that the threat occurred in 'an atmosphere of heightened tensions and emotions in circumstances where the police officers were under intense pressure, believing that J's life was in

[256] *Gäfgen* (n 221) [102].

[257] ibid [103].

[258] ibid [104].

[259] ibid [106].

considerable danger.'[260] Since this last factor cannot be logically relevant to the applicant's mental suffering, it rather reflects the sympathy the majority felt for the unenviable position in which the police officers found themselves. The European Court decided, having reviewed those factors, that the threats to which Gäfgen had been subjected constituted inhuman and degrading treatment but not torture.

The factors absent from the Grand Chamber's list of relevant considerations may be more important than those present. The lack of any mention of the seriousness of the offence and the public interest in securing a conviction is heartening. The 2007 case of *Jalloh v Germany* had suggested that the seriousness of the offence may be a relevant factor in the determination of where on the severity spectrum the impugned ill-treatment lay.[261] *Jalloh* concerned the forcible administration of emetics to a small time drug dealer to procure a packet of drugs that police officers had seen him swallow. The applicant had struggled against the emetic which had meant he needed to be restrained, and experienced considerable pain and discomfort. The Grand Chamber in *Jalloh* had classified that treatment as inhuman and degrading, but said there was no Article 6 issue with the admission of the recovered drugs in evidence against him at trial. Problematically, the Court suggested the 'public interest in securing the applicant's conviction' may be relevant to the assessment of whether the Article 6 right had been breached.[262] This alarming assertion led Judges Wildhaber and Caflisch in dissent to observe, aptly, that 'the majority appears to value the health of large dealers less than that of small

[260] ibid [106].

[261] *Jalloh v Germany* (n 220) [77], [107].

[262] ibid [107].

dealers.'[263] The fact that the Grand Chamber in *Gäfgen* eschewed reference to these factors may reflect a promising return to principle. The Court's statement in *Gäfgen* that 'there can be no weighing of other interests against [Article 3], such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution'[264], makes a return to the *Jalloh* position unlikely.

Limiting devices

Having put some distance between itself and *Jalloh,* the *Gäfgen* Court employed two devices to contain the policy consequences of Article 3. The first was the *Ireland* hierarchy. The Grand Chamber had clearly stated in *Jalloh* that the admission of any evidence obtained by torture would render a trial unfair. But since the threats issued to Gäfgen were 'only' inhuman and degrading, the question remained as to whether the admission of real evidence—as distinct from confession evidence—would lead to the same result. The Grand Chamber held, by 11 votes to six, that it was not strictly necessary to decide.

Thus, the *Gäfgen* Court, like the *Jalloh* Court before it, sheltered behind the possibility that different standards might apply in respect of evidence obtained by inhuman or degrading treatment rather than torture. As has been shown above, while the UNCAT contains a number of different consequences depending on the classification of the treatment as 'torture' or 'cruel, inhuman or degrading', differing consequences are not required by the terms of Article 3. In the context of expulsion, the *Soering* decision boldly extended the same level of protection across both tiers of

[263] ibid 47 [4] (Wildhaber and Caflisch JJ).

[264] *Gäfgen* (n 221) [176].

the *Ireland* hierarchy. However the *Gäfgen* Court refrained from the equal application of that protection.

The second limiting device employed by the Court was its problematic invocation of the doctrine of causation. The Grand Chamber observed that the fairness of the trial, and the protection of Article 3, would only be jeopardised in circumstances where 'the breach of Article 3 had a bearing on the outcome of the proceedings.' The *Gäfgen* Court accepted the possibility that ill-treatment administered during interrogation could have had a bearing on Gäfgen's subsequent decision to confess.[265] However, the domestic court's exclusion of the pre-trial confessions, and the pre-trial caution administered to the applicant regarding his right to remain silent, had broken the chain of causation such that the inhuman and degrading treatment could no longer be regarded as operative. The applicant had, through these measures been restored to the position he was in before the ill-treatment had occurred.[266] The 11-judge majority said that the conviction was 'exclusively' based on the applicant's two confessions made during the trial,[267] and that the items of real evidence were only used to test the veracity of his confessions made at trial.[268]

This reasoning was unpersuasive. It is logically implausible that the conviction was based 'solely' on the later confessions and that the impugned evidence was not relied upon for any questionable purposes. If that were indeed the

[265] ibid [181].

[266] ibid [182].

[267] ibid [179].

[268] ibid.

case, then why admit the evidence at all? Undoubtedly the untainted evidence, such as the ransom money, a note concerning the planning of the crime found in the applicant's flat, and police surveillance of his collection of the ransom, could have supported a conviction for kidnapping with extortion. However it is difficult to say with certainty whether, absent the child's body, the untainted evidence alone could have sustained a murder conviction. It is equally difficult to say with certainty whether the applicant would still have offered a full confession if the items of real evidence had been excluded from his trial.

The better view is that once there has been ill-treatment contrary to Article 3, that ill-treatment continues to have an operative effect and its influence can rarely, if ever, be divorced from subsequent confessions. This position finds support in the Court's own case law in the decisions of *Harutyunyan v Armenia*[269] and *Levinta v Moldova.*[270] In *Harutyunyan,* the acts of police brutality against the applicant had occurred prior to the entry into force of the Convention for Armenia. However, the Convention had entered into force by the time of the applicant's trial. The Court therefore examined the complaint that the admission of confessions and witness statements obtained by beating, kicking, and repeated squeezing of the fingertips with pliers, compromised the fairness of the proceedings. The Court said that the earlier threats and ill-treatment had a continuing effect on the later confessions.[271] There, the Court stressed that 'regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of

[269] *Harutyunyan v Armenia* (2009) 49 EHRR 9.

[270] *Levinta v Moldova* App no 17332/03 (ECtHR December 16, 2008).

[271] *Harutyunyan v Armenia* (n 269) [65].

such evidence rendered his trial as a whole unfair.'[272] Although those cases concerned statements rather than real evidence, the reasoning is compelling.[273]

Conclusions from Gäfgen

Gafgen was a factually peculiar case,[274] for reasons that make the result intuitively satisfying. Nevertheless the case aptly demonstrates the Court's use of limiting devices to avoid the unfortunate policy consequences of extensive Article 3 protection. The Grand Chamber sheltered behind the *Ireland* hierarchy in its classification of the severity of the applicant's suffering as inhuman and degrading but not torture. It then introduced an unpersuasive limiting device based on the principle of causation. The alternative position—a clear statement that the admission of evidence obtained in breach of Article 3 renders a trial unfair—would have been politically unpopular in the circumstances of this difficult case. However it would also have been problematic for the Court, because the breadth of different forms of treatment which can now be classified as 'inhuman' or 'degrading' would have resulted in an extremely broad exclusionary evidential rule. This may account for the Court's hesitance in adopting a clear position of principle with respect to the admission of evidence. If 'degrading treatment' is interpreted so broadly as to include head-shaving,[275] unsympathetic and obstructionist responses by authorities

[272] Ibid [66]; *Levinta v Moldova* (n 270) [100].

[273] A better explanation for the different results in *Harutyunyan* and *Gäfgen* may be that the German Court had engaged in a more rigorous process of contestation than the Armenian Court, which simply admitted the evidence virtually without debate.

[274] See *Gäfgen* (n 221) [97], [158]-[159].

[275] *Yankov v Bulgaria* (n 207).

to the relatives of missing persons,[276] inadequate social pensions or conditions in nursing homes,[277] then it becomes difficult to justify an absolute prohibition on the use of evidence obtained by such means.

4. *Abu Qatada v United Kingdom*

Abu Qatada[278] is one of a series of three cases handed down by the Fourth Section of the European Court in the early months of 2012, none of which were successfully appealed to the Grand Chamber.[279] The other decisions, *Babar Ahmad v United Kingdom*[280] and *Harkins and Edwards v United Kingdom*,[281] concerned the interaction between prison conditions, criminal sentencing, and expulsion, and will be considered below.

Abu Qatada concerned the interaction between extradition and the admissibility of torture evidence. The critical issue was whether a real risk that the courts of a third State would admit torture evidence should prevent the applicant's extradition to face trial. The Court attached an acute importance to the exclusionary rule, using language suggestive of a peremptory norm of international law.[282] However, as in *Soering* and *Gäfgen,* the Court sheltered behind a limiting device to

[276] *Kurt v Turkey* (n 52); Janowiec (n 53).

[277] *Stanev v Bulgaria* (n 49).

[278] *Abu Qatada* (n 76).

[279] This in itself is interesting, since the cases carry significant consequences for extradition arrangements in the Contracting States.

[280] *Babar Ahmad* (n 76).

[281] *Harkins* (n 47).

[282] Article 53 of the Vienna Convention on the Law of Treaties (n 12) defines a peremptory norm as 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted.'

avoid the possible consequences of its expansive statements of principle. In this case, the limiting device was its openness to diplomatic assurances (a long-awaited softening of the principles from *Saadi* and *Chahal*).

The decision

Abu Qatada fled to the UK via Pakistan in 1993 and was granted refugee status and temporary leave to remain. The basis of his asylum claim was that he had previously been detained and tortured by Jordanian authorities in that country, and had also been subjected to house arrest there on two further occasions.[283] Jordanian authorities charged and convicted Abu Qatada in absentia in 1999 of conspiracy to cause explosions, sentencing him to life imprisonment. The charges were connected to bombings at the American School and the Jerusalem Hotel, both in Amman.[284] Abu Qatada's alleged involvement consisted of encouraging the commission of the attacks and congratulating the responsible terrorist group afterwards, and the support for the allegations was the testimony of a co-defendant known as Al-Hamasher.[285] In the following year Abu Qatada was again tried and convicted in absentia, this time in relation to a conspiracy to cause explosions at a range of western and Israeli targets in Jordan, though the plot was uncovered before the attacks occurred. The charge against Abu Qatada was based on evidence of a co-defendant, Abu Hawsher, to the effect that the applicant had given money for the purchase of a computer and had provided written encouragement for the attacks.[286]

[283] *Abu Qatada* (n 76) [7].

[284] *Abu Qatada* (n 76) [9].

[285] ibid [12].

[286] ibid [18].

Abu Qatada was sentenced to 15 years' imprisonment with hard labour.[287] The chief witnesses in each of the two cases, Al-Hamasher and Abu Hawsher respectively, both claimed to have been tortured at the hands of the Jordanian intelligence services.

In 2002, Abu Qatada was arrested in the UK, charged with various terrorist offences, and then issued with a notice of intention to deport him to Jordan. At the time of his arrest his application for indefinite leave to remain was still pending. Conscious of the constraints imposed by previous decisions of the European Court regarding expulsion and Article 3, the UK negotiated and signed an MOU with Jordan to the effect that Abu Qatada would not be subjected to torture upon his return. He challenged the deportation order to the Special Immigration Appeals Commission (SIAC), then the Court of Appeal, then the House of Lords, and finally the European Court.

The European Court's fourth section accepted that the Jordanian MOU mitigated what would otherwise have been a real risk of ill-treatment contrary to Article 3. However, they prevented the extradition on the basis of Article 6, declaring that upon his return and retrial in Jordan he would face a 'flagrant denial of justice'. This formula hearkens back to the statement in *Soering* that 'an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.'[288] The standard was very high, and required 'nullification, or

[287] ibid [19].

[288] *Abu Qatada* (n 76) [113].

destruction of the very essence' of the Article 6 right.[289] *Abu Qatada* was the first time in the 22 years since the *Soering* decision that the Court had found that high threshold to be satisfied. The Court said that the exclusionary rule was a cornerstone of the rule of law and that a real risk of its violation in a third state was sufficient to prevent an expulsion. Here there was such a risk, because the evidence of Al-Hamasher and Abu Hawsher was likely to be led in evidence at his trial. The Court concluded that, notwithstanding the formal prohibition on the admission of torture evidence under Jordanian law, the Jordanian State Security Court had a very poor record of applying that prohibition in practice.

Expansive statements of principle

The Court positioned the exclusionary rule for torture evidence at the centre of the Convention system. The philosophical basis on which they considered the exclusionary rule to be important was its connection with the rule of law.[290] This was important, because alternative bases, such as the inherent unreliability of the evidence, or the need to discipline or deter police, may have facilitated a more attenuated scope for the rule. For example, Lord Phillips of the UK House of Lords had argued that the rationale for the rule was not the unreliability of torture evidence or the unfairness of the trial, but rather because 'the state must stand firm against the conduct that produced the evidence'.[291] This rationale could only apply in the state where the evidence was obtained, that is, in Jordan, and therefore it 'does not require this state… to retain in this country to the detriment of national

[289] ibid [260].

[290] ibid [264].

[291] ibid [62].

security a terrorist suspect'.[292] Importantly, the European Court rejected Lord Phillips' rationale, declaring that the admission of evidence was anathema to the criminal process and indeed, the rule of law. In reaching this decision the Court observed that torture evidence is often unreliable,[293] but boldly and commendably it did not use that argument to avoid engaging with the principle at stake. The Court said that even if the evidence obtained by torture *was* reliable, it must nevertheless be excluded from criminal proceedings (except, of course, any proceedings against the torturer). In a passage of great rhetorical force the Court said that:

> 'no legal system based upon the rule of law can countenance the admission of evidence—however reliable—which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.'[294]

On one reading of this passage, the Court was suggesting that the exclusionary evidential rule itself has the status of a peremptory norm of international law.[295] Another reading is that the Court considered the exclusionary evidential rule to be part and parcel of the *jus cogens* prohibition on torture. This second reading requires that 'the special status of the prohibition of torture as a rule of international *jus cogens* may oblige States to refuse to accept any results arising

[292] ibid.

[293] The Court cited as authority for this proposition its decision in *Söylemez v. Turkey* App no 46661/99 (ECtHR September 21, 2006), which regrettably is currently only available in French.

[294] *Abu Qatada* (n 76) [264].

[295] See above (n 282).

from its violation.'[296] The *Abu Qatada* Court declared that 'torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial.'[297] The Court pointed to the provisions of UNCAT, 'foremost among [which] is Article 15, which prohibits, in near absolute terms, the admission of torture evidence';[298] the widespread ratification of that treaty (that is, the practice of States); 'the clear will of the international community to further entrench the *ius cogens* prohibition on torture';[299] and decisions of the UN Committee Against Torture to apply Article 15 in a range of contexts.[300] These factors, together with the Court's justification that '[t]orture evidence is excluded to protect…. the rule of law itself',[301] support the interpretation that the Court was declaring the exclusionary rule to be a *ius cogens* norm, either standing alone or as part and parcel of the *jus cogens* rule against torture.

The facts before the Court in *Abu Qatada* were admittedly strong: the two key witnesses claimed to have been beaten on the soles of their feet (a technique known as *falaka*) to extract confessions, to the extent that the skin fell off each time they bathed.[302] It was accepted by the Court that where this treatment is applied in order to extract a confession or as punishment it will amount to torture under Article 3.[303]

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[296] Thienel, T, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 363.

[297] *Abu Qatada* (n 76) [267].

[298] ibid [266].

[299] That is, *opinio juris* or the belief by States that their actions are required by law.

[300] ibid [266].

[301] ibid [264].

[302] ibid [270].

[303] ibid [270]. It was observed in Part A that, although there is no purposive requirement in the terms of Article 3, such a requirement has effectively been

In fact, this is something of a fudge: the cases cited by the Court as authority for that proposition included *Salman v Turkey*, where the applicant had been subjected to beating on the soles of the feet *in addition to* 'a blow to the chest powerful enough to break the sternum'.[304] In that case, the Grand Chamber's finding that the applicant had been subjected to torture referred to the cumulative ill-treatment to which the applicant had been subjected, and not the application of *falaka* alone.[305] The objective of a heavy blow to the sternum is not only to cause pain to the victim but to cause him to vomit blood. While it is not disputed that the application of *falaka* alone could constitute torture, the case of *Salman v Turkey* does not provide authority for that proposition, since the detainee in that case was also subjected to other serious forms of ill-treatment. The Court's decision that he had been a victim of torture was a reflection of that cumulative ill-treatment. Likewise the opinion of the Commission in the *Greek Case,* which is often cited by the Court as authority for the proposition that *falaka* constitutes torture, referred to the cumulative conditions to which the detainees were subjected and not the use of that technique alone.[306] The Court's lack of precision in deploying its own case authority is unfortunate.[307] Although it cannot be seriously doubted that the application of *falaka* constitutes torture, the significance of the classification of ill-treatment in the first or second tier of the *Ireland* hierarchy carries important consequences. Greater precision and transparency in the Court's case law should therefore be demanded.

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imported into the Court's case law by means of its reliance on the UN Declaration Against Torture in its early decision in *Ireland.* See Part A(4)(ii) above.

[304] *Salman v Turkey* (2002) 34 EHRR 17 [111].

[305] ibid [114]-[116].

[306] *Greek Case* (n 55) 504.

[307] See also Goss (n 74) 33, for an example of the Court's incorrect citation of authorities in the Article 6 context.

The Court's strong statement of principle in *Abu Qatada* regarding the status of the exclusionary rule was subsequently applied in the recent case of *El Haski v Belgium*.[308] The Court found a flagrant denial of justice under Article 6, because evidence potentially obtained by torture in Morocco was admitted in evidence against the applicant at his trial in Belgium. The Court said that there was a real risk that the evidence in question had been secured through ill-treatment contrary to Article 3, thereby extending and applying the expansive principle from *Abu Qatada*.[309]

Limiting devices

The Court's expansive statements of principle with respect to the importance of the exclusionary rule were nevertheless subjected to limitations. For the first time since *Soering,* the European Court upheld a diplomatic assurance as removing a real risk of ill-treatment in a torture-endemic state. The Court, consistent with the cases of *Chahal* and *Saadi,* assessed the Jordanian MOU to determine whether its 'practical application' provided 'a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention'.[310] The Court's conclusion was that the MOU mitigated both the risk of ill-treatment, and any risk of extraordinary rendition by the US. It seems that the UK has finally found a formula

[308] *El Haski v Belgium* (n 76). Regrettably, the judgment is currently only available in French.

[309] Smet, S, 'El Haski v. Belgium: Continued Debate on the (In)admissibility of Evidence Obtained through Ill-treatment' Strasbourg Observers September 27, 2012 <http://strasbourgobservers.com/2012/09/27/el-haski-v-belgium-continued-debate-on-the-inadmissibility-of-evidence-obtained-through-ill-treatment/> last accessed 4 October 2012.

[310] *Saadi v Italy* (n 218) [148].

that will allow the deportation of terrorist suspects. Given the UK's assertions of the national security risk the applicant posed, the considerable resources devoted to the negotiation and conclusion of the MOU, appointment of a Jordanian NGO to monitor the agreement and the UK's considerable donation to that NGO to strengthen its monitoring capacities, a contrary finding by the Court would have led to significant hand-wringing by UK authorities.

The MOU between Jordan and the UK contained elaborate procedures to protect the applicant against any risk of ill-treatment. Indeed, the Court said that it was superior in detail and formality to any assurances it had previously examined, and any that had been examined by either the UN Committee Against Torture or the UN Human Rights Committee.[311] The Court acknowledged that 'there is widespread concern within the international community as to the practice of seeking assurances' but said that 'its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any risk of ill-treatment.'[312] The Court produced a list of eleven factors relevant to evaluating diplomatic assurances. Those factors were as follows:

(i) whether the terms of the assurances have been disclosed to the Court;
(ii) whether the assurances are specific or are general and vague;
(iii) who has given the assurances and whether that person can bind the receiving State;
(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;
(v) whether the assurances concerns [sic.] treatment which is legal or illegal in the receiving State;
(vi) whether they have been given by a Contracting State;

[311] *Abu Qatada* (n 76) [194].

[312] ibid [186].

(vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;
(viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
(x) whether the applicant has previously been ill-treated in the receiving State; and
(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.[313]

Whatever the relative significance of the eleven factors, the Court appears to have regarded SIAC's determination on the diplomatic assurances (factor xi) as particularly compelling. It referred to the determination of SIAC, and expressed agreement with its conclusions, no less than 10 times in the course of its 13-paragraph analysis of this part of the claim.[314]

Despite this lengthy exposition, the Court did not address a number of the arguments made against reliance on diplomatic assurances generally,[315] or the particular assurance in this case. The UN Committee Against Torture has said that 'diplomatic assurances should only be relied upon in regard to States which do not systematically violate UNCAT's provisions'.[316] The fact that torture was endemic in the Jordanian General Investigation Bureau was conceded by all parties and at all stages of the proceedings both within the UK and before the European Court.

[313] ibid [189] (citations omitted).

[314] ibid [193]-[205].

[315] See, e.g., Izumo (n 65).

[316] Quoted in A Qatada (n 76) [142] and [141]-[145].

On the topic of extraordinary rendition, the Court held that, even though the MOU did not specifically prohibit extraordinary rendition, '[i]t would be wholly incompatible with the MOU for Jordan to… render him to a third state'.[317] The Court had already held in its lengthy admissibility decision on this matter in 2010 that 'extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention' and that to allow it to occur would be 'to collude in the violation of the most basic rights guaranteed by the Convention.'[318] However in the partial admissibility decision, as well as in the judgment on the merits, the Court found that there was no real risk of extraordinary rendition. As to whether any interrogation by US agents in Jordan would comply with Article 3 standards, the Court deferred to SIAC's finding that Jordanian authorities would be careful to ensure that any interrogation by US agents in Jordan did not '"overstep the mark" by acting in a way which violated the spirit if not the letter of the MOU'.[319]

A further limitation on the expansive principle stated by the Court, was its decision to leave open the possibility that different standards might apply to the admission of evidence obtained in breach of the second tier of the *Ireland* hierarchy. The Court observed that, on the facts of this case, it was not required to determine whether a real risk of the admission of evidence obtained by inhuman or degrading treatment would also amount to a 'flagrant denial of justice.'[320] The Court's continued avoidance of this issue—reminiscent of its earlier decisions in *Jalloh* and

[317] Abu Qatada (n 76) [200].

[318] ibid [114].

[319] ibid [200].

[320] ibid [267].

Gäfgen—may reflect aversion to the policy consequences of a more expansive statement of principle, in light of the elasticity of the entry threshold.

The Grand Chamber in *Gäfgen* managed to avoid the question of whether the exclusionary rule should apply with equal force to inhuman or degrading treatment by its rather superficial invocation of the doctrine of causation. This convenient twist allowed the European Court to evade the moral hazard of finding Germany in violation of Article 6, in circumstances where the applicant's crime—premeditated kidnapping and murder of a child—was abhorrent. Similarly in *Abu Qatada*, the Court's selective and somewhat broad-brushed invocation of its own case authorities allowed it to avoid a detailed examination of whether the impugned ill-treatment met the torture threshold. These difficulties might be forgiven had the Court held the same standard applicable regardless of the classification in one category or the other. But so long as the Court continues to suggest that there might be a different standard in respect of evidence obtained by inhuman or degrading treatment than the standard applicable to torture evidence, then it is incumbent upon it to better explain how and why it draws that distinction in each case.

Conclusions from Abu Qatada

The Court's willingness to accept diplomatic assurances sits uneasily beside its statements of the fundamental importance of Article 3. The Grand Chamber refused to hear an appeal from the decision, but since the UK has now managed to secure further assurances from Jordan with respect to the exclusion of torture evidence, the reliability of those assurances will now be litigated in domestic courts. Given that the Court was willing to accept a diplomatic assurance as mitigating the risk of

Article 3 ill-treatment, it seems likely that an appropriate diplomatic assurance in respect of the exclusionary rule would also be accepted. This new openness to diplomatic assurances will no doubt contain some of the policy problems associated with the application of Article 3 to extradition.

5. *Harkins and Edwards v United Kingdom*; *Babar Ahmad v United Kingdom*

The final section of this Part considers the two expository cases of *Harkins and Edwards v United Kingdom*,[321] decided January 17, 2012 and 17 *Babar Ahmad v United Kingdom*,[322] handed down on April 10, 2012. These cases jointly considered two thematic areas: criminal sentencing and expulsion. They expose the incompatibility between the breadth of the second tier of the *Ireland* hierarchy, and the Court's insistence that its protection extends equally across both tiers. *Harkins* and *Babar Ahmad* again illustrate how the breadth of conduct falling within the second tier renders that position untenable.

These cases arose from a problematic passage in the *Soering* judgment, the importance of which has not to date been fully appreciated. The *Soering* Court had declared that an Article 3 problem could arise by reason of '[t]he manner in which [a sentence] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention'.[323] This *dicta* spawned a long line of cases on the compatibility of criminal sentences with Article 3, of which *Harkins* and *Babar*

[321] *Harkins* (n 47).

[322] *Babar Ahmad* (n 76).

[323] *Soering* (n 17) [104].

Ahmad represent the latest development. The Court was compelled in these cases to dilute, in the extradition context, the strength of Article 3's review over criminal sentencing practices. The device used to achieve that dilution was a pragmatic and conceptually cynical solution to a recurring problem, traceable to the *Ireland* hierarchy.

The decisions

Both *Harkins* and *Babar Ahmad* concerned extraditions to the United States where the applicants faced, if convicted, sentences of life imprisonment. The two applicants in *Harkins* faced irreducible sentences of life imprisonment for separate murder charges in Maryland and Florida respectively. In both cases there were mitigating factors that arguably reduced their culpability. *Harkins* was indicted on a charge of felony murder despite his defence that he was not even present at the scene of the crime. He was young and immature at the time of commission, and suffered from a personality disorder. Yet he faced a mandatory life sentence if convicted. *Edwards* was also young at the time of his offence though both were over the age of majority.

Babar Ahmad concerned six terrorist suspects indicted for a range of chilling offences. They arose from: encouragement to participate in, making arrangements for and conducting violent *jihad* in Afghanistan and Chechnya; 'various degrees of involvement in or support for the bombing of the United States embassies in Nairobi and Dar es Salaam in 1998'; the taking of 16 hostages in Yemen in 1998; an attempt to establish a terrorist training camp in Oregon; an alleged plan to attack a US naval battle group in the Persian Gulf; as well as various online exhortations, encouragements and endorsements of terrorism. In addition, one of the applicants was charged with a stunning 269 counts of murder.

The US provided diplomatic notes guaranteeing that the death penalty would not be sought or applied to any of the applicants in *Harkins* or *Babar Ahmad*. In both cases, the extradition was therefore challenged on the basis of the *dicta* in *Soering,* which sparked a trend of cases pointing towards the incompatibility of irreducible life sentences with Article 3.[324] There was for all a *de jure* possibility of release through commutation of the sentence or pardon by their respective state Governors, but they argued that this was not a *de facto* possibility because that decision could not be appealed and the power was sparingly used. An additional ground of appeal in *Babar Ahmad* was the prospect of prolonged solitary confinement, based on the *Soering* dicta regarding conditions of detention. Despite the clear trend in member states away from allowing prolonged periods of solitary confinement, and the Court's extensive case authority limiting the circumstances in which it can be imposed, the *Babar Ahmad* Court declined to follow that trend in the extradition context.

These cases are considered together here because they overlap considerably and in relevant passages the two judgements were verbatim. Taken together, these cases stand for three principles. In order to properly elaborate them, it is necessary to place them in context.

[324] See, e.g., *Kafkaris v Cyprus* (n 47); *Leger v France* (n 236).

Expansive statements of principle

The first principle deriving from *Harkins* and *Babar Ahmad* concerns the concept of proportionality. It was noted above that the Court has, at times, employed aspects of proportionality and balancing analyses as a limiting device. In particular, the *Soering* Court said the Convention demanded a 'fair balance'[325] between the rights of the individual and the general interests of the community. In *Jalloh*[326] the Grand Chamber suggested that the public interest in securing a conviction was relevant to the question whether evidence obtained in breach of Article 3 should be admissible against the defendant. In *N v UK* the Grand Chamber cited the 'fair balance' passage from *Soering* with approval, and went on to find that their was no obligation to provide 'free and unlimited health care to all aliens without a right to stay within its jurisdiction' because '[a] finding to the contrary would place too great a burden on Contracting States.'[327]

The UK has repeatedly argued, based on these statements, that the application of Article 3 in the expulsion context should be subjected to a proportionality assessment.[328] The Court in *Harkins* and *Babar Ahmad* once again rejected that argument. The Court reiterated that the applicants' dangerousness and risk of ill-treatment were 'notions that [could] only be assessed independently of each other'.[329] The Court firmly restated the principle that Article 3 applies

[325] *Soering* (n 17) [89].

[326] *Jalloh v Germany* (n 220) [97].

[327] *N v UK* (n 247) [44].

[328] UK submissions to the Court in *Chahal v United Kingdom* (n 218), *Saadi v Italy* (n 218), *Abu Qatada* (n 76) and *Babar Ahmad* (n 76).

[329] *Harkins* (n 47) [25]; *Babar Ahmad* (n 76) [172]; citing with approval *Saadi v Italy* (n 218) [139].

regardless of a defendant's conduct, and regardless of the risks that he or she poses. There can be no balancing of Article 3.

The *Harkins* and *Babar Ahmad* decisions expressly considered and commendably departed from the 'fair balance' dicta. In a rare instance of the Court expressly contradicting its own precedent,[330] the Court said in both cases that 'in 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 … To this extent, the Court must be taken to have departed from the approach contemplated by… the *Soering* judgment.'[331] The Court was correct in saying that no expulsion decision had *expressly* been subjected to proportionality analysis. However, in effect it applied the proportionality analysis in *N v UK* and in the series of medical cases that followed it.[332]

The doctrine of proportionality has no place in Article 3 jurisprudence. The absence of any limitation or derogation in the text of the Convention means that no interference with Article 3 may be tolerated, however legitimate the objective or well-tailored the means of achieving it. As argued above, the language of proportionality has occasionally been employed in connection with Article 3 to contain the ramifications of the Court's rigid application of the torture threshold

[330] For an analysis of the Court's approach to precedent, see Mowbray, AR, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9 *Human Rights Law Review* 179.

[331] *Harkins* (n 47) [125]; *Babar Ahmad* (n 76) [173].

[332] See, e.g., *Bensaid v United Kingdom* (n 247). This line of cases, and the use of the doctrine of proportionality in determining the scope of positive obligations under Article 3, will be examined in further depth in the DPhil dissertation.

together with its expansive application of the entry threshold. The decisions in *Harkins* and *Babar Ahmad* signal the end of the Court's use of proportionality as a limiting device in this context. However, other limiting devices arose to take its place, as will be demonstrated below.

The second principle deriving from *Harkins* and *Babar Ahmad* is that Article 3 protects against expulsion across both tiers of the *Ireland* hierarchy. The UK argued that it was imperative to limit the application of that Article to the first tier of the *Ireland* hierarchy. In other words, only a risk of torture should be sufficient to prevent expulsion. In light of the breadth of conduct which the terms 'inhuman or degrading treatment' had been held to encompass since *Soering,* an absolute approach to Article 3 in the extradition context was too onerous. The UK advocated a return to the UNCAT standard, which prohibits removal to face a prospect of torture but not necessarily inhuman or degrading treatment.[333] Otherwise, the UK submitted,' practices such as 'head shaving or shackling could act as a bar to extradition because the Court had found these forms of ill-treatment to be in breach of Article 3.'[334]

This argument, if accepted, would have radically reduced the ambit of Article 3 in expulsion cases. As has been observed above, the Court's definition of torture is extremely narrow. While the entry threshold is characterised by its elasticity and inclusiveness, the torture threshold, following *Ireland*, has been strictly policed. The

[333] UNCAT (n 19) Article 3(1) prohibits expulsion where there is a real risk of torture in the receiving state, but the same protection does not apply to cruel, inhuman or degrading treatment or punishment.

[334] *Babar Ahmad* (n 76) [162].

Court's definition of torture is limited to aggravated inhuman treatment causing especially cruel suffering, where that treatment is inflicted with a purpose such as obtaining information or a confession.[335] The rigidity of this threshold explains why the number of violations has remained consistently low in the face of a massive expansion in the Court's case load, and a significant increase in violations of Article 3. Consequently, if Article 3 only prevented expulsions where there was a real risk of torture in the receiving state, then very few expulsions would be prevented. In this context, the Court was correct to reject the UK's argument. The prospect of serious and cruel ill-treatment in the receiving state ought to warrant the Court's intervention, regardless of the purpose for which it is applied. But the UK submission directly confronted the Court with the breadth of ill-treatment which the entry threshold has been allowed to encompass. This compelled the Court's recourse to a new limiting device.

Limiting Devices

The problem confronting the Court was the UK's ongoing protestations—within and without the courtroom[336]—of the highly restrictive effect of the operation of Article 3 in the expulsion context. This restrictive effect is a result of the increasingly broad scope of the terms 'inhuman' and 'degrading'. Having rejected the application of balancing in this context, the Court was compelled to find another way to contain

[335] *Ireland* (n 1) [167].

[336] See, e.g., Doyle, J, 'Britain Finally Fights to Curb European Human Rights Courts and Claw Back Powers, Reveals Leaked Document' Mail Online February 29, 2012 <http://www.dailymail.co.uk/news/article-2108067/Britain-finally-fights-claw-powers-EU-leaked-document-shows-plan-water-human-rights-convention.html> last accessed October 2, 2012.

the policy consequences of its case law on expulsion. They did so by creating a new device to dilute the protection of Article 3.

The new limiting device was a variable standard of review, depending on whether the impugned ill-treatment arises in the domestic or extraterritorial context, and depending on the 'democratic' status of the receiving state. The Court said in both *Harkins* and *Babar Ahmad* that '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.'[337] Put another way, the Court said that the entry threshold for Article 3 is higher in the extraterritorial context than in the domestic context. A certain degree of latitude will henceforth be afforded in the extradition context, to account for the fact that the Contracting States cannot be expected 'to impose Convention standards on other States'.[338]

The *Harkins* and *Babar Ahmad* Courts were anxious to point out that 'Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State.'[339] Prospective ill-treatment in non-Contracting States would be subjected to a less intense standard of review[340]. This was at least partly due to the practical difficulties with reviewing prospective ill-treatment. The Court listed some of the factors relevant to its assessment of the severity spectrum in a given case, such as, inter alia, an intention to humiliate or debase and the arbitrary or punitive

[337] *Harkins* (n 47) [129]; *Babar Ahmad* (n 76) [177].

[338] *Harkins* (n 47) [129]; *Babar Ahmad* (n 76) [177].

[339] *Harkins* (n 47) [129]; *Babar Ahmad* (n 76) [177].

[340] This language draws on the analysis of Rivers (n 244).

nature of an impugned measure.[341] It then observed that 'all of those elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.'[342]

The standard of review may vary depending on the receiving State. The Court in both *Harkins* and *Babar Ahmad* observed that it had historically been cautious in finding Article 3 violations in the expulsion context, and that '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'.[343] In the course of reaching the conclusion that the sentences which the eight applicants in *Harkins* and *Babar Ahmad* faced would not be grossly disproportionate, both judgments observed that 'due regard must be had for the fact that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences'.[344] Taken together, the Court's expression of caution with regard to democratic states, and its acknowledgement of the wide variation in sentencing practices, suggest a generous double standard will be afforded in future cases.

The Court's implicit use of this limiting principle in *Babar Ahmad* and *Harkins* represents a striking new development in its extradition case law. Despite the Court's contrary assertions, this development was not referable to prior authority.

[341] *Harkins* (n 47) [130]; *Babar Ahmad* (n 76) [178].

[342] *Harkins* (n 47) [130]; *Babar Ahmad* (n 76) [178].

[343] *Harkins* (n 47) [131]; *Babar Ahmad* (n 76) [179].

[344] *Harkins* (n 47) [134]; *Babar Ahmad* (n 76) [238].

In both *Harkins* and *Babar Ahmad*, the Court argued that its differential standard of review, which is in some respects analogous to the margin of appreciation, was already a part of its case law. The Court in both cases offered the two cases of *N v UK*[345] and *Aleksanyan v Russia,*[346] both decided in 2008, as authority. However, these authorities do not support the proposition that the entry threshold for Article 3 ill-treatment is higher where the putative ill-treatment occurs in a non-Contracting State. The cases of *N v UK* and *Aleksanyan* are superficially similar, since they both concerned the treatment of HIV-positive prisoners. But they do not suggest a differential application of the severity spectrum based on extraterritoriality. *Aleksanyan* concerned the question whether refusal to transfer a seriously ill prisoner to a specialist clinic would breach Article 3. The Court held that the Russian authorities' refusal to transfer the prisoner on security grounds was unreasonable, and found a violation of that Article. *N v UK* concerned the deportation of an HIV-positive woman to Uganda, where antiretroviral treatment was not widely available. The Grand Chamber found that there was no obligation upon the UK to continue to care for the prisoner. Both decisions adopted aspects of proportionality analysis. The *Aleksanyan* Court balanced the security risk posed by the applicant's transfer to a specialist clinic with the health risks he faced[347]. The *N* judgment relied on a questionable distinction between 'direct' and 'indirect' actions of the receiving state to prevent Europe from becoming 'the sick bay of the world'[348]. There was no suggestion that the severity spectrum was assessed differently in Uganda than in Contracting States; on the contrary, it was quite clear that the suffering the applicant

[345] *N v UK* (n 247).

[346] *Aleksanyan v Russia* (n 48).

[347] ibid [157].

[348] *N v UK* (n 247) 29 (Tulkens, Bonello and Spielmann JJ).

in *N* would experience upon her return would satisfy that threshold. The *N* decision was not concerned with the minimum level of severity at all: it turned on the question of whether any action of the receiving state would be directly or indirectly responsible for the applicant's decline and early death. Nor was the minimum threshold at issue in *Aleksanyan:* rather, the applicant's level of suffering was clear. The question at issue was how far the state's positive obligations under Article 3 extended to mitigate that suffering. Neither case supports the Court's suggestion in *Babar Ahmad* and *Harkins* that there will be a different standard of review for ill-treatment occurring outside Contracting States, or when the receiving state is a democratic and upstanding global citizen.

The double standard that the Court employed in *Harkins* and *Babar Ahmad* could arguably be supported on other bases. Where Contracting States are entitled to a margin of appreciation,[349] perhaps even non-Contracting States should be afforded a certain leeway as to the implementation of human rights, and in resolving any conflicts within or between those rights. However, this would rely upon the receiving state accepting, in principle, the same rights as are applicable in the Council of Europe. The margin might be afforded to allow national authorities to implement and adjudicate those rights, but there cannot be a margin afforded as to recognition of the rights themselves. It may be that this was what the Court was referring to when it said that it would rarely prevent extradition to states which have 'had a long history of respect for democracy, human rights and the rule of

[349] See, e.g., Brems, E., 'Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1996) 56 *Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht* 24.

law.'[350] Of course, there is a certain irony in that description of the United States, which has recently tarnished its credentials in the very area of torture and cruel, inhuman and degrading treatment in the course of the war on terror.[351]

Having set out this double standard, the Court went on to consider the particularities of the sentences with which the applicants were faced. Recalling the principles set out by the Grand Chamber in *Kafkaris*, the Court in both *Harkins* and *Babar Ahmad* said that a mandatory life sentence with no possibility of parole was not '*per se* incompatible with the Convention, although the trend in Europe is clearly against such sentences'.[352] The Court said there were three possible types of life sentences. Life sentences that were clearly reducible, such as those with eligibility for release after the completion of a minimum period, carried no implications for Article 3. Discretionary life sentences with no possibility of parole would not engage Article 3 at the time of imposition, so long as the imposition of the sentence involved 'due consideration of all relevant mitigating and aggravating factors'.[353] Mandatory life sentences with no possibility of parole were more problematic, in the Court's estimation, because they deprive the defendant of the chance to present any mitigating factors to the sentencing court.[354] However in the latter two cases, the

[350] *Harkins* (n 47) [131]; *Babar Ahmad* (n 76) [179].

[351] See, e.g., Danner, M, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York Review Books 2004); Greenberg, KJ, and JL Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (CUP 2005); McCoy, A, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Henry Holt and Company 2006); Sands, P, *Torture Team: Uncovering War Crimes in the Land of the Free* (Penguin UK 2008); Sands, P, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan 2009).

[352] *Harkins* (n 47) [138]; *Babar Ahmad* (n 76) [242].

[353] *Babar Ahmad* (n 76) [241].

[354] ibid [242].

Court said that the Article 3 issue would only arise 'when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible *de facto* and *de jure*.[355] The effect of this statement, endorsed by both Courts in identical wording, is that the Article 3 issue only arises once the applicant is beyond the jurisdictional reach of the Court.

The applicants in *Babar Ahmad* faced a maximum penalty of a discretionary life sentence, which the Court said would not be disproportionate in the circumstances. In relation to the sixth applicant, who faced 269 counts of murder, the Court offered the gratuitous statement that 'indeed, if he is convicted of these charges, it is difficult to conceive of any mitigating factors which would lead a court to impose a lesser sentence than life imprisonment without the possibility of parole, even if it had the discretion to do so.'[356] Thereby introducing a balancing element by the notion of proportionality of sentence to the crime.

In contrast, Harkins faced a mandatory life sentence with no possibility of parole. This was exactly the type of case to which the Court said heightened scrutiny must be applied. It will be recalled that he was charged with felony murder and there were mitigating factors such as his relative youth at the time of the offence and the personality disorder from which he suffered. Clearly, there were grounds here upon which the Court could have found a violation, consistent with its accepted principle that 'in a removal case, a violation would arise if the applicant were able to

[355] *Harkins* (n 47) [138]; *Babar Ahmad* (n 76) [243].

[356] *Babar Ahmad* (n 76) [244].

demonstrate that he or she was at a real risk of receiving a grossly disproportionate sentence in the receiving state.'[357] The Court was unpersuaded, holding that the sentence was not so exceptional as to be grossly disproportionate.[358] Like Edwards, who faced a discretionary life sentence with no possibility of parole, any Article 3 breach would only arise at the time that their continued incarceration was no longer justified.[359]

Conclusions from Harkins *and* Babar Ahmad

As has been shown above, the use of limiting devices is a recurrent feature of the Court's Article 3 case law. It was argued in the context of *Abu Qatada* above that the Court has demonstrated a new openness to extraditions on national security grounds. On one view, the judgments in *Harkins* and *Babar Ahmad* provide further evidence of that change in the Court's disposition. However the particular limiting device which the Court deployed in *Harkins* and *Babar Ahmad* had never been used in that context before. It is therefore surprising that neither case was relinquished to the Grand Chamber,[360] and that subsequent requests for referral to the Grand Chamber were denied. The Convention institutions have found themselves wedged between a rock and a hard place. Continued adherence by the Court to vastly

[357] *Harkins* (n 47) [134]; *Babar Ahmad* (n 76) [238].

[358] *Harkins* (n 47) [139]-[140].

[359] *Harkins* (n 47) [141]-[142].

[360] Article 30 of the Convention provides that '[w]here a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.'

unpopular, though rights regarding, principles risks the UK's exit from the Convention system. The Grand Chamber's apparent avoidance of *Harkins* and *Babar Ahmad*—not to mention *Abu Qatada*—may reflect a degree of reluctance to give its imprimatur to the Fourth Section's systematic softening of protections against inhuman and degrading treatment, as well as a recognition that the softening is required on pragmatic grounds.

Together, the five cases discussed above each manifest a brand of cognitive dissonance: each contains broad and expansive statements of principle, which is then denuded and delimited in its application to the facts. They embody what Dembour has called, in a different context, the Court's endless process of 'trade-offs and compromise' achieved by 'gauging the potential consequences of its position even while creating the impression that human rights prevail over all other considerations.'[361] They reveal that the two tiers of the *Ireland* hierarchy are not necessarily prohibited equally in all contexts. The Court has, at times, adopted the language of balancing and proportionality in its case law. It has retained some doubt about the extent of the exclusionary rule in the case of tainted evidence. And it has adopted a double standard in assessing the appropriate length of sentences and restrictions on contact in prisons.

[361] Dembour (n 14) 9.

CONCLUSION

Article 3 of the European Convention on Human Rights ostensibly provides absolute protection against torture and inhuman or degrading treatment or punishment. As a non-derogable, unqualified right, its importance in the hierarchy of Convention rights is clear. The European Court has on different occasions conceptualised the prohibition contained in Article 3 as one of the most fundamental values in a democratic society,[362] a *jus cogens* norm,[363] and an integral part of the rule of law.[364]

Despite what the Court says, this thesis has demonstrated that the protection afforded by Article 3 is not absolute. Part A argued that Article 3 now embodies a two-tiered protection, with torture elevated above inhuman or degrading treatment. Torture, according to the Court's case law, is characterised by intense severity of suffering and the purpose of extracting information or confessions.[365] In contrast,

[362] *Soering* (n 17) [88].

[363] *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR November 21, 2001) [61].

[364] *Abu Qatada* (n 76) [264].

[365] *Ireland* (n 1) [167] (the Court).

inhuman treatment has no requirement of aggravated intensity and no purposive element.[366] Degrading treatment is that which arouses feelings of fear, anguish and inferiority capable of humiliating and debasing the applicant.[367] The absence of an intention to humiliate or debase is not decisive: it will be enough if the applicant is humiliated in his own eyes or in the eyes of another.[368] Importantly, in the Court's view torture attracts a 'special stigma', and this stigma further distinguishes it from the other forms of ill-treatment prohibited in Article 3.

The drafters of the European Convention did not intend for Article 3 to be broken down into its constituent parts in this way. Close analysis of the *travaux preparatoires* has shown that the drafters viewed the provision holistically, and conceived of no possible limitations or justifications for its breach. There is no support in the *travaux preparatoires* for a 'special stigma' attaching to one part of the Article but not another. The drafting debates centred on issues such as how specifically to enumerate the types of treatment which would be prohibited: whether to specifically mention beatings, sterilisation, torture to extract information or for medical purposes.[369] Other issues canvassed included where best to place the Article in the context of other provisions so as to highlight its foundational status: in the preamble, as Article 1, or with a special accompanying resolution expressing the force with which torture and ill-treatment was condemned.[370] At all times, the

[366] ibid.

[367] ibid.

[368] Ca*mpbell and Cosans v United Kingdom* (n 46).

[369] ECHR Travaux (n 3) vol II, 4, 14, 238-46.

[370] ECHR Travaux (n 3): vol I 296; vol II 14, 36-46, 238-46.

drafters were concerned to protect against weakening the strength of the provision, or to guard against the risk that it might be narrowly construed.

The terms adopted in what is now Article 3 first arose for consideration in the *Greek Case*. The interpretation favoured by the Commission set out the different characteristics of the three concepts embodied in that Article. Having set out the differences, the Commission strongly emphasised the overlapping nature of all three forms of ill-treatment, recognising what has been described elsewhere as their 'essential continuity'.[371] Further, in their lengthy analysis of the substance of claim, the Commission referred to 'torture and ill-treatment' holistically throughout. In the final result, the Commission found that a practice of 'torture and ill-treatment' had been established.[372] In the result and in the reasoning, the *Greek Case* supports a holistic, rather than hierarchical, interpretation of Article 3.

This decision of the European Commission was, in turn, influential in the drafting of the 1975 UN Declaration Against Torture.[373] That Declaration adopted phrases taken directly from the *Greek Case*.[374] However, the UN Declaration elaborated a norm that differed in important respects from Article 3 of the European Convention. The UN Declaration, like the UNCAT which followed it, is limited in scope to torture and ill-treatment committed under the auspices of the State. This is not a requirement of Article 3, which is now widely accepted as applying equally to

[371] Luban (n 172) 222.

[372] *Greek Case* (n 55) 503-5.

[373] Rodley (2002) (n 150).

[374] ibid.

ill-treatment committed by private actors and State agents.[375] Further, the UN Declaration and UNCAT contain an explicit purposive requirement which is not evident in Article 3.

Though the UN Declaration was more limited in scope than Article 3 of the European Convention, it was cited by the European Court in *Ireland v United Kingdom* in support of its conception of that Article. Though the Court did not acknowledge it, this was self-referential, since it was the European Commission's own language in the *Greek Case* which appeared in the Declaration.[376] But this reference was inapt in any case, since the UN Declaration, like the UNCAT, had narrower objectives than the drafters of the European Convention in their broad, absolute proscription of all forms of grave ill-treatment. The drafters repudiated ill-treatment for whatever purpose it was committed, 'whether to save the life of a mother or child, or the security of the State', and not only ill-treatment by State agents for the purposes of extracting information.[377]

Despite the intentions of the drafters, despite the Opinion of the Commission in the *Greek Case,* and despite the different scope and objectives of the UN Declaration, the European Court in *Ireland v United Kingdom* adopted a hierarchical interpretation of Article 3. In its finding that the UK had perpetrated a practice of inhuman and degrading treatment, but not torture, the Court may have been motivated by the policy consequences of being seen to label the British as 'torturers'.

[375] See, inter alia., *MC v Bulgaria* (n 209); *Dordevic v Croatia* (n 76).

[376] Rodley (2002) (n 150).

[377] ECHR Travaux (n 3) vol I 40.

Ironically, in seeking to avoid one adverse policy outcome, the Court created for itself another. The narrow definition the Court adopted in respect of torture necessitated a broader conception of inhuman and degrading treatment. The broad construction of the latter terms has not only opened vast new areas to European supervision: it has allowed a statistically significant increase in the numbers of violations of this provision found by the Court.

The numerical increase in Article 3 violations, and the application of Article 3 to new and unforeseen areas, has carried important consequences. There have been policy consequences for the member states in areas such as national security (where deportation of terrorist suspects is sought to be used as a policy tool)[378] and prisoner's rights (where the proportionality of sentences,[379] conditions of detention[380] and administrative penalties within prisons[381] are all now subject to European supervision). There are potential policy consequences, as yet largely unexplored, in the area of socio-economic rights.[382] Many of these consequences have become the focus of controversy and debate within Contracting States, and the Court has come under sustained criticism in the UK in particular.[383]

[378] See, e.g., *Chahal v United Kingdom* (n 218); *Saadi v Italy* (n 218); *Abu Qatada* (n 76); *Babar Ahmad* (n 76).

[379] See, e.g., *Soering* (n 17); *Leger* v *France* (n 236); *Vinter* (n 47); *Harkins* (n 47).

[380] See, e.g., *Peers v Greece* (n 48); *Kalashnikov v Russia* (n 48); *Ananyev v Russia* (n 48); *Idalov v Russia* (n 76).

[381] See, e.g., *AB v Russia* App no 1439/06 (ECtHR, January 10, 2010); *Babar Ahmad* (n 76).

[382] See, e.g., *Lopez Ostra v Spain* (n 50); *O'Rourke v United Kingdom* (n 51); *Larioshina v Russia* (n 51). See also, in respect of the potential for Article 3 to apply to discrimination claims, *Smith and Grady v United Kingdom* (n 200); *Dordevic v Croatia*) (n 76).

[383] See, e.g., debates reported in Joint Committee on Human Rights, 'A Bill of Rights for the UK?' (The Stationery Office Ltd August 10, 2008).

There have also been legal consequences for the Court's conception of Article 3. These consequences were explored in Part B. This Part outlined the tension between the Court's expansive statements of principle, and its simultaneous use of limiting devices to mitigate against the consequences of this expansiveness. The analysis was structured in four parts, focusing on a number of cases. The language of balancing and proportionality appeared in *Soering, Jalloh* and *N v UK*, but was expressly rejected in *Babar Ahmad* and *Harkins.* The decisions in *Gafgen* and *Abu Qatada* demonstrated the Court's continued reluctance to extend the same level of protection to evidence obtained in breach of either tier of Article 3. That is to say, while the Court emphasised that the admission of torture evidence will always render a trial unfair, and would be a 'flagrant denial of justice', it has left open the prospect that the admission of 'real' evidence obtained by inhuman or degrading treatment might not have the same effect. This limitation sits uncomfortably beside the *Abu Qatada* Court's statement that the exclusionary evidential rule is fundamental to the rule of law, and may even be a *jus cogens* norm.

Together, the decisions in *Babar Ahmad* and *Harkins* illustrate the Court's development of a double standard for Article 3 in the extraterritorial context. These recent cases support the interpretation that the minimum level of severity for Article 3, which has been called here the entry threshold, will be higher where the receiving state is democratic and has a history of respect for human rights. The differential operation of that standard was made plain by the recent domestic cases

of *Vinter* and *Piechowicsz,* where the Court found violations had been established in similar circumstances to *Harkins* and *Babar Ahmad*, respectively.

The three decisions of *Abu Qatada, Harkins* and *Babar Ahmad,* all handed down in early 2012, together strongly suggest a softening of the Court's position with respect to extradition cases. *Abu Qatada* prevented the applicant's extradition in the result, but allowed, for the first time, that diplomatic assurances were sufficient to mitigate Article 3 risks, even in a torture-endemic state. This new openness to diplomatic assurances, together with the reticence expressed in *Harkins* and *Babar Ahmad* to prevent extraditions to democratic, rights-respecting States, represent significant new limitations in the Court's Article 3 case law.

The European Court faces a predicament with respect to its Article 3 case law. Its hierarchical conception of that Article has allowed for two-speed growth in the number of violations. The legal and policy consequences of the expanding second tier—comprised of inhuman and degrading treatment—has compelled the Court to introduce limiting devices. The introduction of these limiting devices into this ostensibly unqualified domain raises the question: can the absolute nature of Article 3 survive?

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