A Discussion of the European Court of Human Rights’ ‘Absolutist Approach’ to Article 3 in Relation to Refugees’ Protection from Refoulement

Abstract

Since Chahal v UK it has been claimed that the European Court of Human Rights is taking an ‘absolutist approach’ to Article 3 ECHR, which disrespects national security concerns. This paper seeks to examine the ‘complementary protection’ offered to refugees and asylum seekers by the Court, examine its rulings on Article 3 cases dealing with non-refoulement, examine the challenge posed by the Courts’ acceptance of ‘diplomatic assurances’ in Othman v UK, and consider finally whether states’ national security concerns are in fact ‘disrespected’.

1. Introduction

This essay will examine non-refoulement in a refugee context. It will first situate the European Court of Human Rights’ ('the Court') non-refoulement standard-setting in the context of ‘complementary protection’ and its role in strengthening non-refoulement. It will then address the charge that: the Court has taken an ‘absolutist approach’ in the context of national security concerns and will challenge this statement with reference to the allowing of diplomatic assurances in Othman. After considering expert opinions on diplomatic assurances, it will attempt to assess if the Court really still is following the absolutist approach it set out in Chahal, or has it deviated.

2. Complementary Protection

While today there is a level of international protection unknown before the Second World War, the refugee is still very exposed. Despite these advances, “there were and there continues to be persistent attempts by both industrialised and developing States to limit their protection responsibilities.”1 The refugees most basic and fundamental protection are States’ non-refoulement obligations – i.e., the right of a refugee not to be sent back to their country of origin where they fear persecution. Yet even for those persons recognised as refugees under the 1951

Convention they are still at risk, as the norm of non-refoulement is vulnerable in two ways: Firstly refugees can be excluded from non-refoulement if they have engaged in serious criminal activity and are deemed a national security threat. Secondly non-refoulement is derogable, so in a national emergency a refugee can be deported.\(^2\) This is the case even when facing serious persecution.

Due to the limitations on refugee protection through the Refugee Convention, there has been an increasing importance placed upon ‘complementary protection’ – which “is, in effect, a shorthand term for the widened scope of non-refoulement under international law”.\(^3\) The most important elements of ‘complementary protection’ is the protection afforded under Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention against Torture (CAT), and Article 3 of the European Convention on Human Rights (ECHR). These articles offer relief from refoulement, and not only complement but augment refugee protection. Firstly, this ‘complementary protection’ is not only extended to Convention refugees, but also to asylum seekers, failed asylum seekers, de facto refugees, etc, - in fact, to every person in a State party to one or more of the treaties. Secondly, unlike the Refugee Convention, neither times of emergency nor the threat posed by the person concerned allow for derogation of the non-refoulement principle. Despite being a ‘bare-bones entitlement', it is a refugee’s most sacred protection.\(^4\)

It is true that ‘complementary protection’ only covers torture and ill-treatment, and so is technically less expansive than the protection afforded by the Refugee Convention, which covers persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. But as Van Dijk states; those who suffer a real risk of persecution are likely also to suffer from a real risk of ill-treatment.\(^5\) Further, the Refugee Convention is limited to the kinds of persecutions covered in Article 1 (a) (2), while for the ECHR, CAT and ICCPR, the reason for the torture does not have limitations. In terms of derogation, Goodwin-Gill & McAdam wonder whether the “broadened principle of non-refoulement under human rights law…[has] rendered Article 33(2) redundant?”\(^6\)

\(^2\) Art 33 (2) of 1951 Refugee Convention.
\(^6\) Goodwin-Gill & McAdam (n 3) 243.
2.1 European Court of Human Rights

With some limitations, there is no explicit restriction on deporting refugees in the ECHR, nor is there any right to asylum.\(^7\) Yet it is often claimed that the Court acts as an ‘asylum court’, and indeed Bossuyt shows that the level of severity required for finding an Article 3 violation is lessened “once the applicant is an asylum seeker.”\(^8\) “[T]here are indeed many similarities between the asylum and non-refoulement procedures, and a certain overlap cannot be avoided.”\(^9\) Since 1961, the European Commission “has recognized that Article 3….could encompass the principle of non-refoulement”.\(^10\) In Soering v United Kingdom\(^11\), the Court emphasised the absolute nature of Article 3, and that it applied to extradition (and thus outside of the espace juridique of the Convention). The Soering principle states that while the returning State is not directly responsible for the potential Article 3 violation, it is nonetheless a facilitator in denying the person their rights.\(^12\) In 1991 in Cruz Varas, the Court expanded the Soering principle to cover expulsion as well as extradition.\(^13\)

In 1997 the Grand Chamber of the Court ruled on the now infamous Chahal case.\(^14\) In its judgment the Court set several important precedents. It ruled that the behaviour of the applicant (in this instance an alleged terrorist) had no bearing on whether or not his deportation would give rise to an Article 3 violation.\(^15\) And most importantly it ruled that there could be no balancing test between the threat posed to national security and the risk of torture or ill-treatment.\(^16\)

\(^7\) The limitations being the prohibition of the expulsion of nationals, and no collective expulsion of aliens. F Jacobs, RCA White, C Ovey, The European Convention on Human Rights (5th edn, OUP 2010) 101.

\(^8\) M Bossuyt, ‘The court of Strasbourg acting as an asylum court’ (2012) 8 ECLR 204. See also Nowak & McArthur (n 5) 208-9.

\(^9\) Nowak & McArthur (n 5) 209.

\(^10\) Goodwin-Gill & McAdam (n 3) 290.


\(^12\) DJ Harris, M O’Boyle, C Warbrick, Law of the European Convention on Human Rights (2nd edn, OUP 2009) 82.


\(^14\) Chahal v United Kingdom (1996) 23 EHRR 413.

\(^15\) Chahal para. 80, cited in Mowbray (n 13) 204; See also Jama Warsame v. Canada CCPR/C/102/D/1959/2010.

\(^16\) Chahal para 81, cited in Mowbray (n 13) 204.
2. The Court’s ‘absolutist approach’

Since Chahal, supporters and detractors both claim that the Court has taken an ‘absolutist approach’ to Article 3, and that this approach disrespects national security concerns. The ‘absolutist approach’ part of this assertion at first glance appears correct.

The Chahal principle was reaffirmed in Saadi, where “[a] unanimous Grand Chamber was not prepared to accept that the values underlying the European Convention that were articulated in Article 3 were open to compromise, however compelling the public interest justification.”\(^{17}\) The UK and other States intervened in this case. While acknowledging that the prohibition on torture was absolute, they claimed any torture inflicted would be the responsibility of the receiving State, not the State that expelled the individual.\(^{18}\) The UK further argued that non-refoulement was a positive obligation (as compare with a negative obligation not to torture) and so positive obligations must be weighed against interests of the community.\(^{19}\) Yet the Court, while recognising the threat of terrorism and States’ difficulties in combating it, found that Article 3 was absolute and therefore there could be no balancing test.\(^{20}\) Further, Article 3 was absolute whether it was the receiving or expelling State that carried out the torture.\(^{21}\)

Finally the threat the applicant poses to national security does not decrease his risk of being tortured.\(^{22}\) I would further argue that in fact the alleged threat posed by the applicant would make them more likely to be at risk of torture, for once he/she was classified as a terrorist, the receiving State would have an increased interest in them.

This ‘absolutist approach’ was continued until the 2012 Othman case. While it would be incorrect to suggest that the Court had now introduced a balancing test between the risk of torture of the applicant and the expelling State’s national security, it did allow for the use of ‘diplomatic assurances’ to negate the (in this case admittedly real and personal) risk of torture faced by the applicant. While the Court had not previously ruled out the possibility of the

\(^{17}\) Harris et al (n 12) 87 (emphasis added).


\(^{19}\) Saadi v Italy (2009) 49 EHRR 30 para 120, cited in Vandova (n 18) 509-10.

\(^{20}\) Saadi para 137, cited in Vandova (n 18) 509.

\(^{21}\) Saadi para 138, cited in Vandova (n 18) 509.

\(^{22}\) Saadi para 139, cited in Vandova (n 18) 510.
acceptance of a diplomatic assurance to negate the risk of an Article 3 violation. I would argue that by allowing them in *Othman*, no matter how ‘comprehensive’, it has set a dangerous precedent in compromising the principle of *non-refoulement* – which is often a refugee’s last line of defence. We will now examine expert’s opinions on diplomatic assurances and weigh the assurance in the *Othman* case against these observations.

### 3. Diplomatic assurances – weakening *non-refoulement*

Due to the ban on *non-refoulement* “several governments have chosen to seek assurances from the receiving State that the individual will not be subject to ill treatment.” The assurances have been sought “predominantly from States known for their use of torture and ill-treatment.” Vandova claims that diplomatic assurances are “inherently unreliable and unenforceable”. Alston & Goodman claim they “should be given no weight when a refugee who enjoys [Convention] protection…is being refouled, directly or indirectly, to the country of origin or habitual residence.” This is because the receiving State has already declared that the country of origin would persecute the refugee. Therefore “it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon refoulement.” Louise Arbour, former UN High Commissioner for Human Rights (2004-2008), has said that reliance on such bilateral assurances “threatens to empty international human rights law of its contents.” Furthermore they create a two-tier system, going against “human rights for all”, ‘protecting’ (but not really) the few while in effect condoning the systematic torture of the ‘rest’ (those not covered by such assurances). She doubts whether post-return mechanisms could ever be efficient enough, as torture happens in secret and is hard to detect. A point several commentators make is that it is paradoxical to look to a State which

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24 *Othman v United Kingdom* 55 EHRR 1, para 194.
26 Vandova (n 18) 511.
27 Vandova (n 18) 513.
28 Alston & Goodman (n 25) 447 (emphasis added).
29 UNCHR Note on Diplomatic Assurances 2006, cited in Alston & Goodman (n 25) 447 (emphasis added).
31 ‘In our name and on our behalf’ 55 Intl and Compl Q 511 (2006), cited in Alston & Goodman (n 25) 448; See also Vandova 512.
practices systematic torture (for if this was not the case an assurance would not need to be sought) to protect someone from torture. Nowak adds that the very category of person involved in these assurances (e.g. ‘Islamist terrorist’) is the type most likely to be tortured.\(^{32}\)

3.1 Diplomatic assurances in \textit{Othman v UK}

The diplomatic assurance under scrutiny in \textit{Othman} was a Memorandum of Understanding (MOU) conducted between the United Kingdom and Jordan. Despite being “superior in both its detail and formality to any assurances which the Court had previously examined”\(^{33}\), many of the above general criticisms ring true in regards to this MOU. Firstly, the MOU states that Jordan “will comply with [its] human rights obligations under international law regarding a person returned under this arrangement.”\(^{34}\) As pointed out by Nowak, Arbour and others, this simply serves to create a two-tier system. Jordan’s human rights obligations already apply to everyone in its territory. Admittedly the MOU grants many favourable return conditions, which included: the person will be humanly treated once arrested; brought promptly before a judge; informed promptly of charges; fortnightly, private visits by an independent body chosen by the UK and Jordan; fair and public hearing, independent and impartial tribunal, public announcement of verdict; and the applicant will be able to cross-examine the witnesses against him.\(^{35}\) In examining this case, the Court acknowledged ‘widespread’, ‘routine’, ‘systematic’ torture in Jordan, and that this torture was carried out with ‘impunity’.\(^{36}\) While further recognizing that “the applicant is part of a category of prisoners who are frequently ill-treated in Jordan”\(^{37}\), the Court sought to ascertain whether the MOU “removed any risk of ill treatment of the applicant.”\(^{38}\) It found that the MOU was ‘specific’, ‘comprehensive’, and ‘addressed directly the protection of the applicants Convention rights in Jordan’.\(^{39}\) The Court stressed the good bilateral relations between Jordan and the UK, and that MOU had the support of the Jordan’s King, and intelligence services (who generally carry out the torture of political

\(^{32}\) Cited in Alston \& Goodman (n 25) 450-1.
\(^{33}\) \textit{Othman} para 194, cited in Alston \& Goodman (n25) 462.
\(^{34}\) Cited in Alston \& Goodman (n 25) 457.
\(^{35}\) Cited in Alston \& Goodman (n 25) 457-8.
\(^{36}\) \textit{Othman} para 191, cited in Alston \& Goodman (n 25) 460.
\(^{37}\) \textit{Othman} para 192, cited in Alston \& Goodman (n 25) 460.
\(^{38}\) \textit{Othman} para 192, cited in Alston \& Goodman (n 25) 460.
\(^{39}\) \textit{Othman} para 194, cited in Alston \& Goodman (n 25) 462.
terrorists). Finally the Court stressed that the high profile case would make Jordan’s more likely to keep to their agreement, for to break it “would cause international outrage.”

We can challenge some aspects of the MOU. As torture is carried out in secret, it would be hard to detect. Even with the support of the authorities, where torture is systematic it is often the case that the rank and file will not heed the orders of their superiors. With regard to post-return monitoring mechanisms, the Court admitted that the head of the Jordanian NGO that was to supervise the applicant’s situation had close family ties to the military. The Court made a point that the NGO would receive “generous funding by the UK government” as if this was supposed to make it more independent. On this matter, Nowak has stated that “where States have identified independent organisations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.” It is worth bearing in mind the similar case of Agiza before the Committee Against Torture, where the applicant was expelled to Egypt with diplomatic assurances he would be not be tortured. He was in fact tortured, although admittedly the assurances in Agiza were weaker than those in Othman. Yet what is important to take note of in this case was the reaction of the expelling State. Sweden originally tried to deny that any torture had taken place, there was no censure or sanction against Egypt for breaking its bilateral assurances, and in fact “the Swedish Government went so far as to strongly criticize the CAT committee and announce its intention not to implement the decision.” Nowak concludes his observations on the Agiza case by stating that “requesting diplomatic assurances in relation to torture will inevitably put the diplomatic service of the requesting State in the very difficult situation of having to withhold relevant information, make false statements and defend a non-defensible position under international law.” It is not inconceivable that a similar outcome will arise from Othman, no matter what kinds of assurances were given and what level of ‘international scrutiny’ bore down on the case.

40 Ibid.
41 Ibid.
42 Cited in Alston & Goodman (n 25) 451.
44 Nowak & McArther (n 5) 217.
45 Ibid.
4. National security concerns

When detractors argue that the Court disrespects the national security concerns they are misconstruing the situation. Firstly, the Court frequently acknowledges the grave impact that international terrorism has on States’ security, and makes mention of the difficulties States face in combating this phenomenon. Yet, as explained above, the Court only seeks to assess whether the removal of an individual would violate a States Convention obligations. The alleged threat posed by these individuals is separate matter and so the Court cannot enact a balancing test. States like the UK, which often intervene in cases similar to Chahal, seeking to get that precedent overturned fully acknowledge that for a State party to the Convention to torture someone, even in a ‘ticking bomb scenario’, is inexcusable. Following the Courts rulings (Soering, Cruz) that this extends to cases of removal, rationally the same logic applies.

More important is the assumption that removing individuals to face the risk of torture is a way to enhance State security. I think this is a false and dangerous assumption. States often claim non-refoulement weakens counter-terrorism actions, “however, interfering with the prohibition of refoulement is not a practical solution to the terrorist threat”. “Deportation, expulsion and extradition are not the only conceivable tools the State has at its disposal.” “Some States have adopted alternative measures such as assigning individuals to compulsory residence, surveillance, periodic reporting to the police, and other non-criminal sanctions”. For recent cases such as those concerning Abu Hamza and Abu Qatada, men who were allegedly great threats and had committed terrorist acts, is it inconceivable for them to be tried in the UK? It is not possible to ensure “that those alleged to have engaged in serious criminal conduct…not avoid trial on such charges” by trying them here? Are human rights and justice mutually exclusive? On a similar issue, Lord Hoffman stated that “the real threat to the life of the nation…comes not from terrorism” but when we allow terrorism to make us renegade on our

46 Chahal, Saadi, etc See also, Askoy v Turkey (1997) 23 EHRR 553 para 62, cited in Mowbray 162.
47 This is not to say that courts haven’t, see Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3
48 Vandova (n 18) 513.
49 Vandova (n 18) 513.
50 Vandova (n 18) 513.
51 Jacobs et al (n 7)103.
human rights commitments. Dauvergne states that while “domestic trails of those suspected of international terrorism or planning offences…cannot guarantee prevention of all future attacks” neither can the anti-terror measures currently employed. Yet at least with her approach, we have not sold out our human rights obligations.

5. Conclusion

In Othman, the Court said that it accepts that “there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security. However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so.” Is this really true? As a standard setter, and a Court of human rights, it seems that the Court, in the interest of minimising future Article 3 violations, should consider “the long term consequences” of essentially allowing States to derogate from their non-refoulement obligations. For asylum seekers and refugees, non-refoulement is often their last line of defence in avoiding persecution. It would be indefensible for the Court to start to chip away at this.

53 Dauvergne (n 52) 545.
54 Othman para 186.