

Protection Against Expulsion Under Article 3 of the European Convention on Human Rights - .

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I. Introduction

Amnesty International reports on incidents of torture in 70 countries,¹ and inhuman or degrading treatment or punishment is practised in an even greater number of states. Many persons from these states leave their home countries and seek refuge in Europe (and elsewhere). They often claim to be threatened with torture or other ill-treatment. Potential victims of such treatment are not always recognized as 'refugees' within the meaning of the Geneva Convention Relating to the Status of Refugees, which would otherwise protect them against *refoulement*.² However, Article 3 of the European Convention on Human Rights can sometimes provide a measure of assistance.

According to this provision 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The European Court of Human Rights held in its judgment in the 1989 *Soering* case that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, 'plainly be contrary to the spirit and intendment of the Article' and would 'hardly be

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1 See Amnesty International, *Report* 1992.

2 According to Article 33 of this Convention persons are only protected if they are threatened with persecution on account of their 'race, religion, nationality, membership of a particular social group or political opinion'. Similar limits are included in Article 22 para. 8 of the American Convention on Human Rights, Article II para. 3 in connection with Article I para. 1 of the African Refugee Convention, Article 3 para. 2 of the European Convention on Extradition, Article 5 of the European Convention on Terrorism and Article 4 para. 5 of the Inter-American Convention on Extradition.

Protection Against Expulsion Under Article 3 of the European Convention on Human Rights

compatible with the underlying values of the Convention'.³ In two cases decided in 1991 the Court held that the same considerations apply to expulsion cases.⁴

Thus the Court confirmed the position held for about 30 years by the European Commission of Human Rights.⁵ The Court's reasoning is convincing and has been widely accepted.⁶

It is the purpose of this paper to examine the conditions under which a person can avoid forcible return under Article 3.⁷ Some procedural aspects will also be discussed. Recent case-law of the Strasbourg institutions will be reported and, where appropriate, commented on critically.

- 3 *Soering v. United Kingdom*, Judgment 7 July 1989, Series A, Vol. 161, paras. 88, 91 (hereafter referred to as *Soering*).
- 4 *Cruz Varas et al. v. Sweden*, Judgment 20 March 1991, Series A, Vol. 201, para. 70 (hereafter referred to as *Cruz Varas*); *Vilvarajah et al. v. United Kingdom*, Judgment 30 October 1991, Series A, Vol. 215, para. 103 (hereafter referred to as *Vilvarajah*).
- 5 The relevance of Article 3 for cases of extradition and expulsion has apparently been considered for the first time in the Commission's decision in *X. v. Belgium*, 29 May 1961, No. 984/61, 6 Collection of Decisions 39-40; see also *X. v. Federal Republic of Germany*, 26 March 1963, No. 1802/62, 6 *Yearbook of the European Convention on Human Rights* (1963) 462, 480.
The Commission, however, has apparently never ruled in a specific case that the applicant must not be expelled or extradited. Only few applications have been declared admissible. Some applicants reached a 'friendly settlement'. See Steenbergen, 'The Relevance of the European Convention on Human Rights for Asylum Seekers', in P. Baehr and G. Tessenyi (eds.), *The New Refugee Hosting Countries: Call for Experience – Space for Innovation* (1991) 45, 49.
- 6 See, for example, Breitenmoser and Wilms, 'Human Rights v. Extradition: The Soering Case', 11 *Mich. J. Int'l L.* (1989/90) 845, 885-886; Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum', 2 *International Journal of Refugee Law* (1990) 361, 366; Frowein, 'General Course: The European Convention on Human Rights as the Public Order of Europe', 1 *AEL* (1990) Book 2, 267, 317; Quigley and Shanks, 'Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?', 30 *Virg. J. I.L.* (1989/90) 241, 251; Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', 39 *ICLQ* (1990) 757, 760-761; Sudre, 'Extradition et peine de mort', 94 *RGDIP* (1990) 103, 121; Achermann, 'Kormentar', 6 *ASYL* (1991) 15, 16; W. Kälin *Grundriss des Asylverfahrens* (1990) 233; Lagodny, 'Anmerkung', 43 *Neue Juristische Wochenschrift* (1990) 2189.
For opinions to the contrary see Gappa, 'European Court of Human Rights – Extradition, Inhuman or Degrading Treatment – Punishment', 20 *Ga. J. Int'l & Comp. L.* (1990) 463, 479; Lillich, 'The Soering Case', 85 *AJIL* (1991) 128, 145-149; Vogler, 'The Scope of Extradition in the Light of the European Convention on Human Rights', in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension* (1988) 663, 669-670. Doubting Warbrick, 'Coherence and the European Court of Human Rights', 11 *Mich. J. Int'l L.* (1989/90) 1073, 1079.
- 7 The following considerations refer mainly to expulsion, but they apply equally to extradition and refusal of admission. With respect to the latter see, for example, Hailbronner, 'Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal thinking?', in D. A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 123, 142. See also A. Zimmermann, 'Asylum Law in the Federal Republic of Germany in the Context of International Law', 53 *ZaöRV* (1993) 49, 58-59.

II. Recent Cases before the European Court of Human Rights

In 1991 and 1992 the Court had to decide three Article 3 cases concerning expulsion:

A. *Cruz Varas et al. v. Sweden*⁸

Hector Cruz Varas fled from Chile to Sweden in January 1987. His request for asylum was rejected in September 1988. In January 1989 he claimed to have been tortured in Chile and two medical reports were submitted that supported his claim. The Swedish Government expelled Cruz Varas to Chile in October 1989. The Court decided that there had been no breach of Article 3.⁹ It had considerable doubts as to the applicant's credibility, since he had spoken of the torture he had allegedly suffered at a very late stage, namely more than 18 months after his first interrogation by the Swedish police. He had changed his story several times, particularly with regard to his alleged clandestine political activities. In addition, it was of significance for the Court that the situation in Chile had in the meantime improved, and the country was moving towards democracy.

B. *Vilvarajah et al. v. United Kingdom*¹⁰

Nadarajah Vilvarajah and four other Tamils were expelled from the United Kingdom to Sri Lanka in February 1988 after having unsuccessfully applied for asylum. Three of them claimed to have been tortured following their return. The applicant Sivakumaran alleged that he had been imprisoned for more than six months and had been tortured every four or five days. Again, the Court found no violation of Article 3.¹¹ Apparently it was decisive for the Court that there had been a voluntary return programme operated by the United Nations High Commissioner for Refugees (UNHCR) and that many Tamils had in fact made use of this scheme and returned voluntarily. The Court conceded that the situation was still unsettled, and that there was a possibility that the applicants might be detained and ill-treated. According to the Court, however, 'a mere possibility of ill-treatment, in such circumstances' is not sufficient to give rise to a breach of Article 3.¹²

8 *Supra* note 4.

9 *Ibid.*, at paras. 77-82.

10 *Supra* note 4.

11 *Ibid.*, at paras. 109-116.

12 *Ibid.*, para. 111.

C. *Vijayanathan & Pusparajah v. France*¹³

Vijayanathan and Pusparajah claimed that they were facing the prospect of an imminent decision to be sent back from France to Sri Lanka. Their requests for asylum had been rejected. The applicants had been directed to leave French territory, and they had been informed that if they failed to comply they would be liable to expulsion. However, no expulsion order thus far had been made. Therefore the Court concluded that the applicants could not yet claim 'to be the victim[s] of a violation' within the meaning of Article 25 of the Convention. So the Court held that it was not able to consider the merits of this case.¹⁴

III. Conditions for Protection against Expulsion Under Article 3

A. Torture or Inhuman or Degrading Treatment or Punishment

1. Act of ill-treatment

Expulsion is incompatible with Article 3 ECHR in the case of threat of 'torture or inhuman or degrading treatment or punishment'. In this section an attempt will be made to briefly clarify and exemplify these concepts. It is not intended, however, to give an exhaustive definition which takes into consideration all borderline issues.¹⁵

Treatment has been held by the Court to be *inhuman* when it is premeditated, applied for hours at a stretch, and when it has caused if not actual bodily injury, at least intense physical and mental suffering.¹⁶ The Court, in view of Article 2 ECHR, has considered that the death penalty is not inhuman,¹⁷ but in a particular case, it found that the conditions of detention while waiting execution (the 'death row phenomenon') amounted to inhuman treatment.¹⁸ On the other hand, any extra-legal execution, for example performed by 'death squadrons', should be regarded as inhuman treatment.

The concept of *torture*, in its core, needs no definition. Torture, be it performed by physical or modern psychological methods, is easily recognizable.¹⁹

13 *Vijayanathan & Pusparajah v. France*, Judgment of 27 August 1992, Series A, Vol. 241-B (hereafter referred to as *Vijayanathan*).

14 *Ibid.*, at para. 46.

15 The Case Law of the Convention organs is reported in some detail in P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed. 1990) 226-235.

16 *Soering*, *supra* note 3, at para. 100; see also the Court's Judgment of 18 January 1978 in *Ireland v. United Kingdom*, Series A, Vol. 25, para. 167.

17 *Soering*, *supra* note 3, at para. 103.

18 *Ibid.*, para. 111. In a similar case the Commission in 1984 had considered the application to be 'manifestly ill-founded' with respect to the death row phenomenon. See *Kirkwood v. United Kingdom*, Commission Decision of 12 March 1984, No. 10479/83, 37 DR 158, 190.

19 With regard to today's methods of torture see the impressive description by Sørensen and Kemp Genefke, 'Medical Aspects of Torture', in A. Cassese (ed.), *The International Fight against Torture* (1991) 11, 12-18.

The Court defines torture as 'deliberate inhuman treatment causing very serious and cruel suffering',²⁰ thus classifying it as an aggravated form of inhuman treatment.

Treatment has been considered by the Court to be *degrading* 'because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.²¹

It has yet to be determined how far state measures not including deprivation of liberty may be seen as inhuman or degrading.²² In two cases of extradition to the former Soviet Union²³ the Commission found no violation of Article 3, although the applicants, being mentally healthy, had been declared mentally ill there. As a result, they were, *inter alia*, not allowed to work, to study, to marry or to create a family. The Commission found such a situation 'manifestly' not degrading or inhuman, a result which is certainly debatable.

Inhuman punishment would include, for example, amputation of a part of the body, i.e. an act of inhuman treatment that is used as a punishment. In addition, punishment can also be inhuman if it is out of all proportion to the offence committed,²⁴ or if the person concerned has, for political reasons, to face an unjustified or disproportionate sentence.²⁵

Correspondingly, the notion of *degrading punishment* includes degrading treatment imposed as a punishment, for example corporal punishment.²⁶ However, the element of degradation connected with any form of legitimate punishment is irrelevant under Article 3.²⁷

In any event account is to be taken of 'all the circumstances of each case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.²⁸

20 *Ireland v. United Kingdom*, *supra* note 16, at para. 167.

21 *Ibid.*, confirmed in *Soering*, *supra* note 3, at para. 100.

22 See, for example, Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic conditions?', 2 *EJIL* (1991) 141-145.

23 *Kozlov v. Finland*, Commission Decision of 28 May 1991, No. 16832/90; *Varfolomejev v. Finland*, Commission Decision of 2 September 1991, No. 17811/91; both unpublished.

24 See the Commission's Decision of 6 May 1978 in *Kotilla v. Netherlands*, No. 7994/77, 14 DR 238, 240; Trechsel, 'Grundrechtsschutz bei der internationalen Zusammenarbeit in Strafsachen', 14 *Europäische Grundrechte-Zeitschrift* (1987) 69, 73.

25 *Altun v. Federal Republic of Germany*, Commission Decision of 3 May 1983, No. 10308/83, 36 DR 209, 233 (hereafter referred to as *Altun*); *A. v. Switzerland*, Commission Decision of 14 April 1986, No. 11933/86, unpublished.

26 *Tyler v. United Kingdom*, Judgment 25 April 1978, Series A, Vol., 26, paras. 31-35.

27 *Ibid.*, para. 30; see also M. Nowak, *CCPR-Kommentar* (1989) 140.

28 *Ireland v. United Kingdom*, *supra* note 16, at para. 162; *Soering*, *supra* note 3, at para. 100.

Protection Against Expulsion Under Article 3 of the European Convention on Human Rights

These definitions of 'torture or inhuman or degrading treatment or punishment', as set out above, apply even if expulsion to a non-European country is at stake. The treatment in question has to be measured by European standards.²⁹

2. The relevance of private ill-treatment

Article 3 binds the expelling state. This state is obliged, irrespective of who commits the ill-treatment, not to become indirectly responsible for a serious violation of human rights. Consequently, expulsion may be prohibited not only in cases where the person concerned fears ill-treatment performed by the state, but also if he or she expects to be ill-treated by a non-governmental entity. The finding that a danger of ill-treatment exists does not necessarily involve the liability of the government of the state where the person might be ill-treated.³⁰

B. The Assessment of the Risk of Being Ill-treated

According to the Court, an expulsion violates Article 3, 'where substantial grounds have been shown for believing that the person concerned ... faces a real risk' of ill-treatment.³¹

The Court's wording takes account of the fact that, in expulsion cases, the ill-treatment is a possible future event. Thus naturally it is not provable, and only a prognosis can be made. The Court does not require certainty that the ill-treatment will actually occur,³² but considers a 'real risk' to be sufficient. However, it is necessary that 'substantial grounds' can be established which enable the conclusion that the person concerned faces a real risk of ill-treatment.

Two questions arise at this point. First, what is a 'real risk', what can it reasonably mean: a small, a medium, a high probability? Second, what kind of facts may be considered 'substantial grounds' for believing that the person concerned faces a real risk of ill-treatment? These issues will be dealt with in the following sections.

1. Real risk of ill-treatment

It follows directly from the Court's case-law that a 'real risk' is not necessarily a particularly high probability.³³ Thus in the *Soering* case the Court stated that it was not

29 *Soering*, *supra* note 3, at para. 88 and para 93.

30 This seems to be generally accepted. *Altun case*, *supra* note 25, at 232; see also *F. v. Switzerland*, Commission Decision of 1 October 1990, No. 14912/89, unpublished; M. Pellonpää, *Expulsion in International Law* (1984) 145; Einarsen, *supra* note 6, at 369; Steenbergen, *supra* note 5, at 63.

31 *Soering*, *supra* note 3, at para. 91.

32 As it was suggested by the British Government in *Soering*. See the Court's Judgment, *supra* note 3, at para. 83.

33 Cf. Einarsen, *supra* note 6, at 372.

certain and not even probable that the applicant would be sentenced to death and subjected to the 'death row phenomenon'.³⁴ Nonetheless the risk was, in the Court's view, 'such as to bring Article 3 into play'.³⁵

A 'risk', if it exists at all, can hardly ever be characterized as 'unreal'. So nearly every risk is a 'real' one. Therefore it seems that the Court considers even very small risks to be relevant under Article 3. The circumstances in which the Court introduced the 'real risk' standard point in the same direction. The Court partly adopted the wording of Article 3 of the UN Convention against Torture. This provision prohibits the expulsion of a person 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Whereas the first part ('substantial grounds') was adopted by the Court, the word 'danger' in the second part was replaced with 'real risk'. I think that in normal language a 'risk', in comparison with a 'danger', is something more abstract, more distant. In choosing the expression 'real risk' the Court obviously wanted to accept as relevant not only 'dangers' but also small and very small risks, as long as they are not 'unreal'.

This interpretation of Article 3 actually appears to be the most convincing one. It would be difficult to explain why small risks should be irrelevant under Article 3. The provisions of the Convention have to 'be interpreted and applied so as to make its safeguards practical and effective'.³⁶ One has, accordingly, to interpret the right to be protected against expulsion in the case of threat of ill-treatment in an effective way. If one interpreted the concept of 'real risk' in such a way that small probabilities below a certain level might be neglected, this would in the long run – as probability means nothing other than relative frequency – lead to the result that a certain quota of the persons obliged to return would be ill-treated.³⁷ The right of these persons not to be subjected to ill-treatment would, in such a case, not be protected effectively. 'Torture quotas' are not acceptable.

The only legal protection against ill-treatment which is really effective is *prevention*. A violation of Article 3 causes suffering that is hardly repairable; at the very least torture leaves scars for life. So prevention is 'the key'.³⁸ Whenever a person is not deported to a country where he or she might be ill-treated, an act of ill-treatment has been successfully prevented. This point gives the Court a justification for pronouncing, in extradition and expulsion cases, on the existence of potential

34 *Soering*, *supra* note 3, at para. 94.

35 *Ibid.*, at para. 99.

36 *Ibid.*, at para. 87. The Court's constant case-law conforms with this view.

37 For example: if a risk of five per cent is neglected, ultimately up to five per cent of the expelled persons will be ill-treated. In another context which may, however, be comparable see A. Grahl-Madsen, *The Status of Refugees in International Law* Vol. I (1966) 180. The author expresses the view that a person may have a 'well-founded fear of persecution' within the meaning of the Geneva Refugee Convention if he or she faces a probability of not more than 10 per cent of being persecuted.

38 Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', 83 *AJIL* (1989) 128, 129.

violations of the Convention.³⁹ At the same time, it is additional evidence that a broad interpretation of the concept of 'real risk' is appropriate.

It cannot be overlooked, on the other hand, that the Court obviously wanted to distinguish between 'real' and other risks. There is probably no country in which ill-treatment can never occur. Article 3 therefore does not protect persons against the 'residual risk' that cannot be avoided. Accordingly it is necessary, when deciding whether a person should be expelled, to distinguish between such a 'residual risk', meaning a vague, distant possibility, and a real risk which may be very small, but to be taken seriously.

The severity of the foreseeable consequences in each particular case should be taken into account when assessing whether a risk is 'real' or not. If there is a very small probability of ill-treatment, it may exclude expulsion in a case of threat of torture or arbitrary killing, whereas the consequence must not necessarily be the same if, for example, a threat of light corporal punishment is at stake.⁴⁰ This distinction may be justified, *inter alia*, by the fact that the 'unavoidable residual risk' also varies with regard to different forms of ill-treatment. Even in a perfect democratic state of law the risk of being beaten by a state organ is greater than the risk of being tortured or killed in prison.

Since *Soering* the European Commission of Human Rights normally applies the 'real risk' standard when examining applications under Article 3. Interestingly enough, the Commission sometimes requires a 'serious risk'⁴¹ or a 'substantial risk'.⁴² These standards, however, are not identical. There may be small 'real' risks that cannot be considered 'serious' or 'substantial'. So the Commission appears to apply a stricter standard than the Court in some cases, which is, in the absence of any justification, not convincing.

2. 'Substantial Grounds' for believing that a real risk of ill-treatment exists

In the preceding section an attempt has been made to describe in abstract terms what constitutes a 'real risk'. In a concrete case one has, however, to solve the problem of how to infer the existence or otherwise of a real risk from the facts established.

According to the Court 'substantial grounds for believing' that the person concerned faces a real risk of ill-treatment are necessary.⁴³ These words may well be interpreted in such a way that the prognosis with regard to whether a real risk of ill-

39 *Soering*, *supra* note 3, at para. 90.

40 Einarsen, *supra* note 6 at 371 and 372. A similar view was taken by the German *Bundesverwaltungsgericht* in its Judgment of 5 November 1991, 107 *Deutsches Verwaltungsblatt* (1992) 828, 830.

41 See, for example *A. & F. v. Turkey*, Commission Decision of 12 January 1991, No. 14401/88; *A. v. Switzerland*, Commission Decision of 14 January 1991, No. 17428/90; *Gezici v. Switzerland*, Commission Decision of 7 March 1991, No. 17518/90; *K. v. Switzerland*, Commission Decision of 7 March 1991, No. 17547/90; unpublished.

42 *R. v. Denmark*, Commission Decision of 14 October 1991, No. 16381/90, unpublished.

43 *Soering*, *supra* note 3, at paras. 88, 91.

treatment exists can only be supported by established facts, as opposed to suppositions or possibilities.

Even if all relevant facts are known, one is confronted with the problem that the facts cannot simply be subsumed under the concept of 'a real risk'. The facts, of course, refer to the past or present, whereas the risk at stake can only be determined by a prognosis directed to the future.

It is not possible, at least within the framework of this paper, to suggest a general method to conclude from facts concerning the past of a person the future events endangering a potential torture victim. An attempt will now be made, however, to exemplify the kind of facts which may typically enable the conclusion that a 'real risk' exists.

Subsequent ill-treatment: it may seem that the most definite proof that the applicant's fears were justified is if – at the time of the decision on the Convention issue – deportation has already been executed⁴⁴ and he or she has in fact been ill-treated.⁴⁵ It is true that one must conclude from such an event that there was a real risk at the time of deportation. Subsequent ill-treatment, however, cannot be a 'substantial ground' in the meaning explained above, since the relevant information is that available at the time of deportation. Nonetheless, the Convention organs take into account information which comes to light subsequent to the expulsion, as this may be of value in confirming or refuting the appreciation that has been made by the Contracting Party, or the well-foundedness of an applicant's fears.⁴⁶

Previous ill-treatment: very often there may be 'substantial grounds' if the person concerned has previously been ill-treated in his or her state of origin.⁴⁷ A person who was persecuted once is very likely to be persecuted again.⁴⁸ So previous ill-treatment is a strong indication that there is a risk of further ill-treatment.⁴⁹ In such a case the state of origin has manifested its hostile attitude towards the person concerned. A victim of torture or other ill-treatment is known to the State as an individual opponent. The risk that the State will maltreat this opponent again cannot, as a rule, be deemed 'unreal'.⁵⁰

44 As was the case in *Cruz Varas* and *Vilvarajah* *supra* note 4.

45 In the *Vilvarajah* case three applicants claimed to have been ill-treated after their return. See *supra* part II.

46 See *Cruz Varas* *supra* note 4, at para. 76; *Vilvarajah* *supra* note 4, at para. 107.

47 In this case the person concerned may also have a traumatic fear of returning to his or her home country. This alone may be an impediment for deportation, irrespective of the existence of an objective risk. See *infra* part C.

48 See the German *Bundesverwaltungsgericht*, Judgment 27 April 1982, 65 *Entscheidungen des Bundesverwaltungsgerichts* 250 (concerning the German law of asylum).

49 This seems to have been the Commission's minority view in its *Cruz Varas* report of 7 June 1990, No. 15576/89 (unpublished), 31: 'In view of the fact that the Commission has found that Mr. Cruz Varas has been subjected to treatment contrary to Article 3 ... in the past ... it was for the Government to show that, at the time of the expulsion, there was no longer any risk'.

50 Different considerations may apply if the situation in the state of origin has changed considerably. In the *Cruz Varas* and *Vilvarajah* cases, the majority of the Commission came to the conclusion that the situations in Chile and Sri Lanka respectively had improved in such a way that there was no 'real risk'

Protection Against Expulsion Under Article 3 of the European Convention on Human Rights

The general situation in the state of origin: if torture and other ill-treatment are common throughout a state, there may be – as soon as ‘repression density’ reaches a certain level – a small but real risk of every citizen becoming a victim of such treatment.⁵¹ For example, if arbitrary arrest and ill-treatment are the order of the day, even the most law-abiding citizen cannot protect himself against it. What is *not* required is a particular personal risk in the sense that the person must be in greater danger than anyone else in his or her environment.⁵² The Commission has frequently examined whether the conditions in a country are such that an expulsion to this country would generally be a violation of Article 3.⁵³

If *home-coming refugees are regularly ill-treated* in a particular state, it is clear that a ‘real risk’ exists whenever a person is expelled to that country.⁵⁴

3. ‘Substantial grounds’ in the *Cruz Varas* and *Vilvarajah* cases

As has already been noted, the Court found that the facts did not sufficiently establish a ‘real risk’ of ill-treatment in these cases. This finding will be commented on critically in the following passage.

In *Cruz Varas* it was accepted that the applicant had been ill-treated in the past.⁵⁵ Then the only plausible explanation was that this treatment had been carried out by persons for whom the then Chilean regime was responsible. This was also the Commission’s view,⁵⁶ whereas the Court expressed doubts in this respect.⁵⁷ The Court, however, did not say who else could have tortured Cruz Varas. The Court held that the applicant’s claim failed for lack of substantiation,⁵⁸ but it may have set a standard that was too high, as far as this point was concerned.

The human rights situation in Chile had improved by the time Cruz Varas was expelled.⁵⁹ However, Pinochet was still in power at the time of deportation, and there

at the time of expulsion. See the *Cruz Varas* report *supra* note 49, at paras. 85/86; *Vilvarajah et al. v. United Kingdom*, Commission Report of 8 May 1990, No. 13163/87 *et al.*, para. 143, unpublished.

51 However Hailbronner, *supra* note 10, at 142, is of the opinion that more than ‘generalized terror or violence’ is necessary. For the contrary view see Einarsen, *supra* note 6, at 370-371.

52 No ‘special sacrifice’ of the person concerned is necessary under Article 3, and no ‘singling out’ is required. See W. Killin, *Grundriss des Asylverfahrens* (1990) 46-47, with respect to the recognition of a ‘refugee’ within the meaning of the Geneva Convention.

53 See the *Cruz Varas* report, *supra* note 49, at para. 82; *M. v. Sweden*, Commission Decision of 16 March 1990, No. 16279/90, unpublished; *Kirkwood v. United Kingdom*, *supra* note 18, at 183. A list of more Commission decisions concerning this issue can be found in Council of Europe (ed.), *Digest of Strasbourg Case Law*, Vol. I (1984) 119-120.

54 See for example, *Verwaltungsgericht Neustadt*, Judgment 5 July 1991, 11 *Neue Zeitschrift für Verwaltungsrecht* (1992) 296, 297. According to a May 1991 report of the German foreign ministry, young male Tamils who return to Sri Lanka are regularly interrogated by the police at Colombo airport where ‘at least beating’ (which amounts to degrading treatment) is the order of the day.

55 *Cruz Varas*, *supra* note 4, at para. 77.

56 *Cruz Varas* report, *supra* note 49, at para. 83.

57 *Cruz Varas*, *supra* note 4, at para. 77.

58 *Ibid.*, at para 78.

59 *Ibid.*, at paras. 34, 35 and 51.

were still reports of torture.⁶⁰ Under these circumstances the Court's finding was not self-evident, and perhaps the Court should have explained in some more detail why the risk Cruz Varas ran was not a 'real' one.

In the *Vilvarajah* case the Court took the view that the beginning of the UNHCR voluntary repatriation programme had been a 'strong indication' that the situation in Sri Lanka had improved sufficiently.⁶¹ However, this argument appears debatable for various reasons. First, it is not apparent from the judgment what happened to the voluntary home-comers, whether their situation was proved to be safe. Second, there is a fundamental difference between a voluntary and an involuntary return.⁶² Given that many people do not even try to flee from dangerous countries, it is clear that a refugee may well decide to return voluntarily for many kinds of reasons even if a risk of ill-treatment exists. So the fact that there are voluntary returns does not necessarily mean that there are no risks. Third, the argument used by the Court loses some of its value⁶³ as a result of the fact that the same organization that operated the voluntary return programme, namely the UNHCR, had urged the British Government not to send back any Tamils to Sri Lanka.⁶⁴

C. Protection Against Expulsion Because of Previous Torture

Whereas the above considerations refer to persons who claim to be threatened with ill-treatment *in the future*, an expulsion may also, in exceptional cases, prove to be inhuman *regardless of any risk of future ill-treatment*.

This is true in particular in cases where deportation in itself endangers the health of the person concerned.⁶⁵ The person's mental anguish of anticipating the violence that is likely to be inflicted on him is to be taken into account.⁶⁶

This issue can be of particular relevance in the case of persons who have previously been tortured in the country to which they are going to be expelled.

Torture victims find it very painful to carry the mental consequences of the ill-treatment they have been subjected to.⁶⁷ If a torture victim has succeeded in fleeing to another country and started recovering, then the mere idea of returning to the 'land of

60 Ibid., at para. 35.

61 *Vilvarajah*, *supra* note 4, at para. 110.

62 This difference was also emphasized by the minority of the Commission. See Trechsel *et al.*, dissenting opinion, *Vilvarajah* report, *supra* note 50, at 43. A general criticism of 'voluntary return programmes' is given by Chimni, 'Perspectives on Voluntary Repatriation', 3 *International Journal of Refugee Law* (1991) 541-546.

63 The minority of the Commission took a similar view. See Trechsel *et al.*, *ibid.*

64 *Vilvarajah*, *supra* note 4, at para. 77.

65 Commission Decision of 15 December 1977, No. 8088/77, in Council of Europe (ed.), *Digest of Strasbourg Case Law*, Vol. 1 (1984) 149. See also *Brückmann v. Federal Republic of Germany*, Commission Decision of 27 May 1974, No. 6242/73, 46 *Collection of Decisions* 202.

66 *Soering*, *supra* note 3, at para. 100.

67 See for example, Sørensen and Kemp Geneffe, *supra* note 19, at 15-16.

torture' can trigger such a trauma that in itself expulsion has to be considered cruel and therefore inhuman.⁶⁸

Hence it is the victim's psychological condition that is crucial in such cases. This point, it appears, has not been sufficiently taken into account by the Court in the *Cruz Varas* case. The Court accepted, on the one hand, that the applicant suffered from a 'post traumatic stress disorder', that he was very afraid of returning to Chile and that he was not far from committing suicide.⁶⁹ On the other hand, the Court concluded that Cruz Varas had, due to the inconsistencies in his statements, not shown a 'substantial basis' for his fears.⁷⁰ However, it is precisely such a basis that is *not* necessary.⁷¹ If subjective fear reaches a certain measure, even an imaginary fear can be relevant under Article 3 and rule out deportation. The violation of this Article in such cases, the inhuman action, is that the contracting state subjects the person to an experience which is extremely traumatic for him or her. This appears to have happened in the *Cruz Varas* case, and the Court's argumentation, as far as this point is concerned, is unsatisfactory.

D. Restrictions

Article 3 of the Convention does not permit any derogation, and cannot even in times of emergency be restricted (Article 15 paragraph 2). This applies also insofar as Article 3 is a protection from expulsion.⁷²

The Court stated in the *Soering* judgment that when interpreting the notions of 'inhuman and degrading treatment or punishment' within the meaning of Article 3, a 'fair balance' has to be found between the individual's interest and the *general interest* of the community.⁷³ This wording illustrates that the value of the general interest as a figure of argumentation is not very high as far as Article 3 is concerned: it cannot be a limit to this human right, but it is just one relevant factor in the interpretation process. The general interest is certainly not, as it is suggested,⁷⁴ a means to 'evade the absolute character of Article 3'. When concluding the Convention, the Contracting States

68 This issue was examined by the Convention institutions in the *Cruz Varas* case. See the Commission's report, *supra* note 48, at paras. 87-90; Trechsel *et al.*, *supra* note 58, at 31; and the Court's Judgment, *supra* note 4, at paras. 83/84.

69 *Cruz Varas*, *supra* note 4, at paras. 44, 46, 84.

70 *Ibid.*, para. 84. See also Macdonald, 'Interim Measures in International law', 52 *ZaöRZ* (1992) 703, 707: 'The determination that there was a lack of substantial basis for his fears meant that the alleged trauma could not exceed the threshold of Art. 3'.

71 Similarly, Einarsen, *supra* note 6, at 368.

72 See M. Pellonpää, *supra* note 30, at 145; W. Kälin, *supra* note 52, at 247; M. Raess, *Der Schutz vor Folter im Völkerrecht* (1989) 109-110. The Court emphasized the 'absolute character' of Article 3 in the *Vilvarajah* Judgment, *supra* note 4, at para. 109. The opposing view is supported by Hailbronner and Randelzhofer, 'Zur Zeichnung der UNFolterkonvention durch die Bundesrepublik Deutschland', 13 *Europäische Grundrechte-Zeitschrift* (1986) 641, 644.

73 *Soering*, *supra* note 3, at para. 89.

74 Steenbergen, *supra* note 5, at 57.

decided to respect without restrictions the fundamental right of every human being not to be tortured or otherwise ill-treated.

The question might be raised of whether *expulsion* to another *Contracting State of the Convention* is permitted, either generally or under easier conditions. This, however, is not the case. It is true that in a number of decisions concerning principally expulsion to Turkey, the Commission regularly pointed to the fact that it was open to the applicant to bring an application under Article 25 of the Convention in respect of any violation of his human rights by the Turkish authorities.⁷⁵ Yet this consideration seems to be worded as an *obiter dictum*; the Commission apparently did not want to say that it can be expected of a person to allow himself to be maltreated first if he or she can then complain about it. In Spring 1992 the Commission gave interim indications under Rule 36 of its Rules of Procedure to prevent several persons from being expelled to Turkey.⁷⁶

No list of 'safe countries' can be decisive for the question of whether an expulsion measure violates Article 3 or not. This follows from the preceding considerations with respect to the 'list' of Contracting States; in addition, one should keep in mind that the *Soering* case itself concerned the USA, a state that might normally be deemed to be a 'safe country'.⁷⁷

The Contracting States have no *margin of appreciation* in Article 3 cases. In particular, the assessment of the risk of being ill-treated has to be made by the Convention institutions themselves. Their examination of the issue is not restricted to the question of whether the state's assessment has been unreasonable or arbitrary. In view of the absolute character of Article 3, the Court even stresses that its examination in this respect has to be 'a rigorous one'.⁷⁸

75 See, for example, *G. v. United Kingdom*, Commission Decision of 7 December 1990, No. 15608/89; *Y. v. Federal Republic of Germany*, Commission Decision of 9 November 1990, No. 17377/90; *Y. v. Netherlands*, Commission Decision of 18 May 1990, No. 16217/90; *T. v. Switzerland*, Commission Decision of 16 March 1990, No. 16217/90; unpublished. The same argument was used in *A. v. Netherlands*, Commission Decision of 12 December 1991, No. 15564/89, unpublished, concerning extradition to Norway, and in *K & F. v. Netherlands*, Commission Decision of 2 December 1986, No. 12543/86, 51 DR 272, 277, concerning extradition to the United Kingdom.

76 See *A. Zimmermann*, *supra* note 7, at 70; *U., E. & C. v. France*, Commission Decisions of 10 December 1992, Nos 19464/92, 19818/92 and 19984/92, unpublished. The practice of torture and other forms of severe ill-treatment of persons in police custody appears to be widespread in Turkey. See European Committee for the Prevention of Torture, 'Public Statement on Turkey', 4 *EJIL* (1993) 119.

77 *Ibid.*, at 69.

78 *Vilvarajah*, *supra* note 4, at para. 108. See also *T. v. Netherlands*, Commission Decision of 13 November 1987, No. 13292/87, unpublished: 'Under its independent duty under the Convention to assess itself the existence of an objective danger, the Commission notes ...'.

E. Expulsion to a Third Country

It may occur that a person who is threatened with ill-treatment in one country is expelled to another country. In such cases the danger exists that he or she is then expelled to the potential state of persecution.⁷⁹ Expulsion to a third country is therefore not compatible with Article 3 of the Convention if the person concerned faces a real risk of being deported further.⁸⁰ Such a risk exists if the person is not, in the third country, protected in fact and in law against being expelled to the potential state of persecution.

IV. Procedural Aspects

Two levels may be distinguished in this respect. On the one hand, the Convention regulates its own procedure before the Commission and the Court; on the other hand, the Convention may contain some requirements with regard to domestic proceedings.

A. Proceedings Before the Convention Organs

A person can only claim to be a 'victim of a violation' within the meaning of Article 25 of the Convention if an *enforceable expulsion order* has already been issued against him or her; this follows from the Court's judgment in the case of the Tamils *Vijayanathan & Pusparajah*.⁸¹ This decision, however, is not entirely without its problems. The opinion of the Court is understandable in view of the fact that apparently, of the many Tamils whose requests for asylum are rejected in France, only a few are actually expelled to Sri Lanka.⁸² On the other hand, persons expecting their expulsion from France to another country must now face a gap in their legal protection. They have to wait for a formal expulsion order; once it is issued, they can lodge an appeal with the Administrative Court within a time-limit of just 24 hours.⁸³ Such a short time-limit can easily be missed due to circumstances beyond the applicant's control.

79 See, for example, the case described in Amnesty International, *Europe – Human Rights and the Need for a Fair Asylum Policy* (1991) 10. A group of 17 Tamils was sent back to Sri Lanka from Austria via Italy; both European states had refused to admit them since each state considered the other one competent to examine the asylum claims.

80 Similarly, *Einarsen*, *supra* note 6, at 372. The Commission considered the existence of a risk of being deported further in *G. v. Switzerland*, Commission Decision of 7 March 1991, No. 17518/90, unpublished; *X. v. Federal Republic of Germany*, Commission Decision of 30 September 1974, No., 6315/73, 1 DR 73.

81 *Supra* note 12, at para. 46.

82 *Ibid.*, at para. 44.

83 *Ibid.*, at para. 26.

An applicant has in general no right that the deportation order should be suspended while proceedings in Strasbourg are pending. The Commission,⁸⁴ however, frequently makes use of Rule 36 of its Rules of Procedure whenever an application appears to have some prospects of success. In such a case the Commission indicates to the Government that it is desirable not to deport the applicant until the Commission has had an opportunity to examine the application.⁸⁵ In the Court's view, however, states are not obliged to comply with such an opinion, since no specific provision in the Convention empowers the Commission to order interim measures.⁸⁶ Still, it is in the interest of the State concerned to comply with Rule 36 requests if they want to avoid committing a violation of Article 3.

Full proof is not always required. As far as the personal destiny of the applicant is concerned, in particular with regard to previous ill-treatment, the applicant will frequently not be in a position to offer objective evidence. The Convention organs are apparently satisfied if the applicant's affirmations are credible. On the other hand, if there are doubts as to the applicant's credibility, this often has the consequence that the Commission considers the application to be manifestly ill-founded.⁸⁷ Nevertheless, each particular case needs a thorough examination of whether alleged inconsistencies in the applicant's statements actually exist or whether they can be resolved by the applicant in a convincing way. In asylum proceedings⁸⁸ there is, because of their complexity, much room for misunderstanding. In particular, real torture victims have to overcome considerable inhibitions before they are able to speak about the treatment they have been subjected to.⁸⁹ They do not necessarily speak about it when interrogated for the first time.⁹⁰ If they start speaking later about their suffering,⁹¹ this should not automatically be considered to be an indication of lack of credibility.

84 Or where it is not in session, its President.

85 See, for example, *Cruz Varas*, *supra* note 4, at para. 56; *Soering*, *supra* note 3, at para. 76.

86 *Cruz Varas*, *ibid.*, at paras. 90-104. This view has been strongly criticized as rendering European human rights protection ineffective. See the dissenting opinion of the judges Cremona *et al.*, para. 2, and the opinion of the Commission in *Cruz Varas* report, *supra* note 49, at paras. 105-128. See also Cohen-Jonathan, 'De l'effet juridique des "mesures provisoires" dans certaines circonstances et de l'efficacité du droit de recours individuel', 3 *Revue Universelle des Droits de l'Homme* (1991) 205, 208; Macdonald, 'Interim Measures in International Law', *supra* note 70 at 731-740.

87 See for example, *C. v. France*, Commission Decision of 6 June 1991, No. 17877/91; *L. v. France*, Commission Decision of 4 June 1991, No. 17643/91; *K. v. Switzerland*, Commission Decision of 7 March 1991, No. 17517/90; *H. v. Netherlands*, Commission Decision of 10 May 1990, No. 16505/90; unpublished.

88 It is such proceedings in which states frequently allege that there are inconsistencies in an applicant's statements.

89 See, in detail, Kälin, *supra* note 52, at 297 *et seq.* and 318. See in particular the cases described in note 211 on page 297; Jepsen, 'The General Health of Asylum Seekers - the Danish Experience' in D. Miserez (ed.), *Refugees - the Trauma of Exile* (1988) 80, 83; Horvath-Lindberg and Movschenson, 'The Swedish Red Cross Centre for Tortured Refugees', in D. Miserez (ed.) *Refugees - The Trauma of Exile* (1988) 192, 204.

90 This is especially true for members of clandestine organizations for whom silence was crucial for survival in the past. A duty to be silent may be deeply internalized. Cf. Kälin, *supra* note 52, at 315 ('Schweigepflicht tief internalisiert').

91 *Cruz Varas*, *supra* note 4, at para. 14-28.

It is, according to Article 28 paragraph 1(a) of the Convention, the task of the Commission to *ascertain the facts ex officio* once an application has been accepted.⁹² As far as the admissibility stage is concerned, the Convention contains no rules. At this stage the Commission can dismiss 'manifestly ill-founded' applications. Thus there is no duty upon the Commission to ascertain the facts *ex officio*, and at this stage the applicant is expected to describe his experiences and fears in some detail and to supply 'prima facie evidence' to support his allegations.⁹³ However, Article 28 should have the effect that the Commission will not dismiss an application as being 'manifestly ill-founded' as long as it seems possible that it could be successful after an investigation *ex officio*.⁹⁴

B. Requirements with Regard to Domestic Proceedings

If a person claims to be threatened with ill-treatment following expulsion, a Contracting State, before deporting the person, has to carry out a material examination of the issue – in whatever form and intensity – with regard to the question of whether expulsion would be compatible with Article 3.⁹⁵ Pending this examination the person concerned must not be deported, since otherwise his or her human rights could be irreparably violated. Thus the person has a *right to temporary stay* up to the first decision on the issue.

If this decision turns out to be negative, applicants with an 'arguable claim'⁹⁶ have the right to an effective remedy under Article 13 of the Convention. A remedy can only be deemed 'effective' if deportation cannot be executed until the case has been decided.⁹⁷ Up to this point the applicant in question must be allowed to stay.⁹⁸

It follows from the Court's case-law that the Contracting states have a general *duty to know the relevant facts in so far as it is possible*, for, according to the Court, 'the

92 The Court, as a rule, relies upon the facts as ascertained by the Commission. See for example *Cruz Varas*, *ibid.*, at para. 75.

93 Einarsen, *supra* note 6, at 361, 373.

94 The Commission, in practice sometimes appears to take a different view. In the case of *M. v. Sweden*, Commission Decision of 16 March 1990, No. 15795/89, unpublished, the Commission simply stated: 'The information available ... is not sufficient'. In *Y. v. Netherlands*, Commission Decision of 18 May 1990, No. 16558/90, unpublished, the Commission considered that the applicant had not substantiated that prosecution because of his political past in Turkey would necessarily entail being subjected to ill-treatment. This was a point which deserved an *ex officio* investigation. In *P. v. United Kingdom*, Commission Decision of 9 November 1987, No. 13162/87, unpublished, the Commission did not examine *ex officio* whether all Tamils in Sri Lanka are in danger of being ill-treated. All these applications were declared inadmissible.

95 Einarsen, *supra* note 6, at 361, 381.

96 See *Boyle and Rice v. United Kingdom*, Court Judgment 27 April 1988, Series A, Vol. 131, para. 52.

97 *Vihvarajah* report, *supra* note 50, at para. 153.

98 This is also the view of Einarsen, *supra* note 6, at 381-382. For the contrary view see K. Hailbronner, *Ausländerrecht* (2nd ed. 1989) 458.

existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State'.⁹⁹

V. Outlook

In view of the deplorable human rights situation in large parts of the world, the ban on *refoulement* under Article 3 of the Convention is relevant in many cases. By withholding potential victims from their tormentors Article 3 contributes to the prevention of acts of torture and other ill-treatment even outside Europe.

The fact that the Convention provides such a safeguard may have the consequence that a large number of cases will have to be considered, and that a multitude of persons seeking protection will reside temporarily or permanently in member states of the Council of Europe. This may cause problems for these states. However, such problems cannot be weighed against the fundamental right of everyone to be spared from torture and inhuman or degrading treatment and punishment.

The states of Europe are not powerless in the face of this problem. They have opportunities to work towards the aim that the responsible states tackle their human rights problems effectively, for example, by criticizing these states, by supporting administrative reforms and local human rights organizations, by using international instruments for the protection of human rights (inter-state applications), or by using economic or political pressure.¹⁰⁰ States should make contributions to a kind of 'development aid' against torture.¹⁰¹ The more torture and other ill-treatment can successfully be dammed worldwide, the lesser will be the burden that European states have to carry by taking in people seeking refuge.

⁹⁹ *Cruz Varas*, *supra* note 4, at para. 76; *Vihvarajah*, *supra* note 4, at para. 107. (Italics added)

¹⁰⁰ See, in detail, Kälin and Achermann, 'Rückkehr von Gewaltflüchtlingen in Sicherheit und Würde', in W. Kälin and R. Moser (eds), *Migrationen aus der dritten Welt* (3rd ed. 1993) 235, 250-251.

¹⁰¹ Cf. Kooijmans, 'The Ban on Torture', in F. Matscher (Ed.), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich. (The Prohibition of Torture and Freedom of Religion and Conscience: Comparative Aspects)* (1990) 93, 107-108.