The Court of Strasbourg Acting as an Asylum Court[1]

Marc Bossuyt*

Article 3 ECHR and expulsion, extradition – Indirect and potential violations – Interim measures – Lowering of threshold – Transformation from civil to social right – Asylum seekers special vulnerable group

Introduction

It was only in 1991 that the European Court on Human Rights (hereafter: the Court) adopted its first judgment concerning asylum seekers.[2] A considerable increase in the number of such judgments has taken place since its judgment *Mamatkulov and Askarov* v. *Turkey* (GC, 4 February 2005). Most typical of those judgments are findings of indirect violations of Article 3 of the European Convention on Human Rights (hereafter: the Convention) in the event that a refugee or an asylum seeker[3] would be expelled or extradited to a country where he would be exposed to treatment contrary to that Article.

* The author is professor emeritus of the University of Antwerp, former Belgian Commissioner General for Refugees and Stateless Persons (1987-1997), former Chairperson of the UN-Commission (1989) and Sub-Commission (2006) on Human Rights, former Member of the UN-Committee on the Elimination of Racial Discrimination. The opinions expressed in the present article are personal to the author and may not be attributed to the Belgian Constitutional Court of which he is president.

[1] The present contribution is based on an analysis of the judgments of the Court concerning Art. 3 of the Convention in cases concerning refugees and asylum seekers from 1 July 2009 until 31 Jan. 2012. As such, it is the follow up of a study published by the same author: M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant* (Bruylant 2010), 189 p., covering the judgments of the Court until 30 June 2009. A restructured version of excerpts of that book has also been published in English: M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', 3(1-2) *Inter-American and European Human Rights Journal* (2010), p. 3-48.

[2] *Cruz Varas and Others* v. *Sweden*, Pl. Ct, 20 March 1991.

[3] Some of the applicants have been recognized refugees under the mandate of the UNHCR or by the competent national authorities. They have all at least applied for asylum, but very often their application has been rejected.

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In the period under review (1 July 2009-31 January 2012), the Court found 21 such indirect violations in the case of an expulsion and 14 in the case of an extradition. In 15 judgments, the Court found no indirect violation of Article 3 of the Convention by a State party ordering the extradition (2) or the expulsion (13) of the applicants. Finally, in 14 judgments, the Court found a direct violation of Article 3 of the Convention by a State party for inflicting on its own territory inhuman or degrading treatment on asylum seekers.[4]

As far as the indirect violations of Article 3 of the Convention are concerned, there was in 2009-2010 a sharp increase in the number of judgments (forty in two years or more than in the fifteen previous years) as well as in the percentage of violations found (90%),[5] but in 2011 there was a decrease particularly in the percentage of violations (31.5% violations in 19 judgments). Apparently, the Court became somewhat more cautious in speculating about future events in non-States parties. Only a minority of those judgments seem to be controversial but they have far reaching consequences. As far as the direct violations of Article 3 of the Convention are concerned, there was in 2010-2011 an increase in the number of judgments (12) and also very slightly in the percentage of violations found (83%).[6] Striking, however, is not as much the number of violations but the lowering by the Court of the level of severity required, once the applicant is an asylum seeker.

In the first section, the present comments cover those judgments in which the indirect responsibility of a State party was examined in the event of an expulsion or an extradition of the asylum seeker. In the second section, they cover the judgments in which the Court found that the ill-treatment of an asylum seeker by a State party constituted a direct violation of Article 3 of the Convention.

[4] None of those judgments are yet published in printed form. They can all be found by referring to their name and date in the Hudoc database of the European Court of Human Rights (<www.echr.coe.int/echr/>). Only the judgments *Abdolkhani and Karimnia* v. *Turkey* (22 Sept. 2009) and *M.S.S.* v. *Belgium and Greece* (GC, 21 Jan. 2011) are available in French and English. All other judgments are in English, with the exception of those against Belgium, France, Greece and Romania. Unless indicated otherwise, all findings of the Courts were unanimous.

[5] In the previous 15 years, there have been 33 judgments and 54% violations (the ratio was 4 violations to 9 non-violations from *Soering* v. *the United Kingdom*, Pl. Ct, 7 July 1989, till *Mamatkulov and Askarov* v. *Turkey*, GC, 4 Feb. 2005, and since then till the end of 2008, the ratio was 14 violations to 6 non-violations).

[6] Compared with 9 judgments and 77.7% violations since *Dougoz* v. *Greece* (6 March 2001) till the end of 2009.

Judgments concerning the indirect responsibility of states parties

As far as the indirect responsibility of States parties is concerned, a great number of judgments which do not give rise to critical comments will be dealt with first.

The non-controversial judgments

Nearly all judgments concerning extraditions and several judgments concerning expulsions are non-controversial. It is not surprising that the judgments concerning extraditions give less cause for criticism. The risks involved in the case of an extradition are obviously greater than in the case of an expulsion. Expulsions take place at the initiative of the expelling state, while extraditions take place on the initiative of the country of destination. Except in the exceptional case of an expulsion on grounds of national security, it is much less probable that the government of the country of destination is interested in a person to be expelled than is the case with a person to be extradited. In most cases of expulsion, the government of the country of destination is even totally indifferent to the fate of the expelled person. Nevertheless, its cooperation for the readmission of the expelled person is often indispensable. In a case of extradition, the cooperation of the government is ensured but the person to be extradited risks, at least, legal prosecution which will probably lead to imprisonment.[7]

Indirect responsibility in case of extradition

The first case in which the Court found an indirect and 'potential'[8] violation of Article 3 of the Convention concerned a request for extradition of a German national, Mr Jens Soering, addressed to the United Kingdom by the United States of America. All the other extradition requests were made among former Member States of the Soviet Union. With the exception of *Shamayev and Others* v. *Georgia and Russia* (12 April 2005), the countries of destination of the person to be extradited were not States parties to the Convention. Other earlier judgments concerned requests for extradition addressed to Russia[9] and Ukraine[10] by Turkmenistan and to Russia[11] by Uzbekistan.[12]

[7] Bossuyt (book), *supra* n. 1, p. 25 and 129-130.

[8] The violation had not taken place but there was a real risk that it could take place if the person would be extradited (Soering, *supra n. 5,* § 90).

[9] *Garabayev* (7 June 2007) and *Ryabikin* (19 June 2008) v. *Russia*.

[10] *Soldatenko* v. *Ukraine* (23 Oct. 2008).

[11] *Ismoilov and Others* (24 April) and *Muminov* (11 Dec. 2008) v. *Russia*.

[12] Only in *Garabayev*, the extradition had taken place and the indirect violation was not 'potential'.

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Judgments finding an indirect violation in case of extradition

The findings of an indirect violation of Article 3 of the Convention in ten judgments concerning an extradition request addressed by Tajikistan[13] or Uzbekistan[14] to Russia are well founded. The Court points to the absence of evidence of improvements in the 'overall human rights situation' in the countries concerned where ill-treatment of detainees is an 'enduring problem' (Tajikistan) and torture is 'endemic and persistent' (Uzbekistan). Several of the applicants were involved in activities of Hizb ut-Tahrir, a transnational Islamic organisation, and more precisely in the civil war which erupted in 1992 in Tajikistan or in the demonstrations which took place on 13 May 2005 in Andijan (Uzbekistan), and are charged with 'politically motivated crimes', such as attempting to violently overthrow the State's constitutional order (Uzbekistan). The indirect violations of Article 3 of the Convention were 'potential', with the exception of *Iskandorov,* because in that case the applicant, one of the leaders of the United Tajik Opposition during the abovementioned civil war, had been abducted to Tajikistan.

The four other judgments are based on less solid grounds. In *Baysakov and Others* v. *Ukraine* (18 February 2010) one may wonder whether the extradition to Kazakhstan of the four applicants was still envisaged, since the Ukrainian courts had upheld the rejection of the objections to the decision granting them refugee status. In *Kaboulov* v. *Ukraine* (19 November 2009), *Garayev* v. *Azerbaijan* (10 June 2010) and *Kolesnik* v. *Russia* (17 June 2010) there is no clear evidence that the extraditions requested by Tajikistan, Uzbekistan and Turkmenistan are politically motivated. One that commits a crime in those three countries should not be ensured to find a safe haven in Azerbaijan, Russia or the Ukraine.

Judgments finding no violation in case of extradition

In two recent judgments, the Court found no (indirect) violation in case of an extradition to Kazakhstan or to Rwanda.

In the case of *Sharipov* v. *Russia* (11 October 2011), the extradition of the applicant was requested for fraud by the Almaty Department for Economic Crimes and Corruption. The Court did not find a violation of Article 3 of the Convention since 'there was no indication that the situation was grave enough to call for a total ban on extradition [to Kazakhstan]' and the applicant did not assert 'that he belonged to the political opposition or to any other vulnerable group' (§§ 35-36).

[13] *Khodzayev* (12 May), *Khaydarov* (20 May), *Iskandarov* (23 Sept.) and *Gaforov* (21 Oct. 2010) v. *Russia*.

[14] *Yuldashev* and *Abdulazhon Isakov* (8 July), *Karimov* (29 July), *Sultanov* (4 Nov. 2010), *Yakubov* (8 Nov.) and *Ergashev* (20 Dec. 2011) v. *Russia*. In *Ergashev*, the Court found also a (direct) violation of Art. 3 of the Convention (*see* text between n. 89 and n. 90 *infra*).

Particularly noteworthy in view of the country of destination is the case of *Ahorugeze* v. *Sweden* (27 October 2011), in which the Court holds that the extradition to Rwanda of the applicant, a Rwandan Hutu who allegedly acted as a leader for the *Interahamwe* militia during the genocide on Tutsi in 1994, would not involve a violation of Article 3 of the Convention. The Court notes that there is no evidence 'which gives reason to conclude that there is a general situation of persecution or ill-treatment of the Hutu population in Rwanda' (§ 90). The Court notes also that Rwanda's extradition request state that the applicant will be detained at the Mpanga Prison and, during his trial, at the Kigali Central Prison and that the International Criminal Tribunal for Rwanda, the Netherlands Government which intervened as a third-party, and the Oslo District Court all confirm that the two mentioned detention facilities meet international standards. The Court has regard also to the fact that 'the Special Court for Sierra Leone has sent several convicted persons to the Mpanga Prison to serve their sentences there' (§ 92).

Indirect responsibility in case of expulsion

There are as well judgments finding, as judgments not finding, an indirect violation of Article 3 of the Convention which do not give rise to much criticism.

Judgments finding an indirect violation in case of expulsion

Among the non-controversial judgments finding an indirect violation of Article 3 of the Convention in the event of an expulsion, some are directed against Turkey. Others, directed against France, the Netherlands or Bulgaria, are in line with the judgment *Saadi* v. *Italy* (GC, 28 February 2008).

Judgments directed against Turkey

– The judgments prohibiting the expulsion to Iran or Iraq of members of the People's Mojahedin Organisation in Iran (PMOI),[15] who had lived in Iraq, first in the Al-Ashraf camp and later in the Ashraf Refugee Camp created by the US Forces, and to Tunisia of members of *Ennahda,*[16] at that time an illegal organisation in Tunisia, are well founded. No one will doubt that Iran persecutes PMOI members and that Iraq is for them not a safe country, nor that, at the time of the judgment, members of *Ennahda* were persecuted in Tunisia. With respect to the two judgments concerning expulsions to Tunisia, it may be questioned whether it was appropriate for the Court to recall its judgment *Saadi* v. *Italy* (GC, 28 Feb-

[15] *Abdolkhani and Karimnia* (22 Sept.), *Keshmiri* and *Tehrani and Others* (13 April 2009) v. *Turkey*. For a (direct) violation of Art. 3 of the Convention in *Tehrani and Others*, *see* text between n. 92 and n. 93 *infra*.

[16] *Charahili* (13 April) and *Dbouba* (13 July 2010) v. *Turkey*. For a direct violation of Art. 3 of the Convention in *Charahili*, *see* text between n. 87 and n. 93 *infra.*

ruary 2008).[17] Neither of the two applicants, recognized refugees under the UNHCR's mandate, was condemned for any crime in Tunisia. Only in the hypothesis that Turkey would consider membership of *Ennahda,* a Tunisian organisation, in itself as a threat to its own security, would the case *Saadi* v. *Italy* be relevant.

– Three other judgments[18] against Turkey concern Iranians, recognized as refugees under the UNHCR's mandate after their conversion to Christianity. Their conversion took place after their arrival in Turkey and in one case (*M.B. and Others*) after an initial refusal by UNHCR to recognize them. Some will be surprised that Turkey seems to be a fertile environment for conversions from Islam to Christianity but the Court confines itself to considering the assessments of the UNHCR as a substantial ground for accepting that the applicants risked a violation of their rights under Article 3 of the Convention, if returned to Iran.

Judgments in line with the judgment *Saadi* v. *Italy*

– In the case *Daoudi* v. *France* (3 December 2009), the applicant was stripped in 2002 of his recently acquired French nationality and condemned in 2005 in Paris to six years imprisonment for having participated in an association of wrongdoers with the aim of preparing a terrorist act. The French National Court of the Right of Asylum (*CNDA*) had applied to him the exclusion clause of Article 1, F, (c), of the Geneva Convention.[19] That French Asylum Court considered, however, that it was reasonable to believe that he could be the object of inhuman or degrading treatment in Algeria. Referring to its judgment *Saadi* v. *Italy* and considering that the applicant would likely be a target for agents of the Algerian military security, the European Court holds that his expulsion to Algeria would violate Article 3 of the Convention.

– In the case *A.* v. *Netherlands* (20 July 2010), the Court recognizes that 'it has not been established that the applicant had attracted the negative attention of the Libyan authorities '…' prior to his departure from Libya'. The initial rejection of his asylum request submitted in 1997 is thus not contested. A return to Libya becomes only problematic after his arrest in 2002 and the media attention[20] caused

[17] In that case (*see* Bossuyt (article), *supra* n. 1, p. 34-39), the Court considered that the expulsion of the applicant, sentenced in Italy and Tunisia for belonging to a terrorist association, would violate Art. 3 of the Convention.

[18] *Z.N.S.* (19 Jan.), *Ahmadpour* and *M.B. and Others* (15 June 2010) v. *Turkey*.

[19] 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that : '…' (c) he has been guilty of acts contrary to the purpose and principles of the United Nations'.

[20] The argument of the information of the Libyan mission in the Netherlands that he had been placed in alien's detention for removal purposes is only acceptable in combination with that media attention.

by the 'Rotterdam jihad trial' in 2005 which led to his acquittal. The lesson that the Government of the Netherlands might draw from this judgment is that in 2002 it would have done better to repatriate the applicant to Libya instead of having him arrested and put on trial. The United Kingdom, which was the only third party intervener in the case *Saadi* v. *Italy*, was joined in its intervention in this case by the governments of Lithuania, Portugal and Slovakia. The same arguments were developed as by the United Kingdom in *Saadi* v. *Italy*, but without success.

– In the case *H.R.* v. *France* (22 September 2011), the applicant[21] was sentenced to life imprisonment in Algeria for having given in 1998 assistance to members of a terrorist group and to 15 months imprisonment in Lyon in 2010 for counterfeiting. The Court considers that, while the applicant failed to show that he is exposed to a real and present risk from terrorists in Algeria, his condemnation in that country is sufficient to attract the attention of the Algerian authorities at his arrival at the airport and that it was likely that he could become a target for the Algerian military security (§§ 52-54 and 58).

– In the case *Auad* v. *Bulgaria* (11 October 2011), the State Agency for National Security proposed to expel the applicant, a stateless person of Palestinian origin, from Bulgaria on national security grounds, less than three weeks after the State Refugees Agency had granted him humanitarian protection. Referring to its judgment *Saadi* v. *Italy*, the Court observed that any considerations concerning the national security of Bulgaria were irrelevant for the Court's examination (§ 101). The Palestinian refugee camps to which he would in all likelihood be returned, were under control of various Palestinian armed factions and the camp from which he fled, appeared to be one of the more chaotic and violent camps (§ 103). Because the competent domestic authorities and courts did not try to make any assessment of that risk, the Court, unable to conclude that the Bulgarian authorities had duly addressed the applicant's concern with regard to Article 3 (§ 104), holds that his expulsion, if carried out, would breach that Article (§ 108).

Judgments finding no (indirect) violation in case of expulsion

Some of the judgments finding no (indirect) violation in case of expulsion are mainly based on new developments in the country of origin of the applicant.[22] A few other of those judgments are in line with the judgment *N.* v. *the United Kingdom* (GC, 27 May 2008).

[21] It is strange that, by referring to applicant's asylum procedure in France (§§ 8-15), no mention is made of his French nationality (§ 1).

[22] The judgment *B.A.* v. *France* (2 Dec. 2010), in which the Court did not find an indirect violation of Art. 3 of the Convention, is more delicate because it concerns a military man who could be considered to be a deserter from the Chad Army. It may be assumed that the French authorities are best placed to evaluate this kind of risks.

Judgments mainly based on new developments in the country of origin

– The Congolese applicant in *Mawaka* v. *the Netherlands* (1 June 2010) arrived for a second time in Belgium in 1995 (two years before president Mobutu Sese Seko was evicted by president Laurent-Désiré Kabila) and requested asylum in the Netherlands one day later. Two years later, Mr Sita Mawaka was condemned in Belgium for drug offences. Referring also to the inconsistencies in his story, the Dutch Minister revoked his residence permit. Noting that 'a significant period of time [had] lapsed since the applicant left his country of origin' (§ 45) and since, 'as the situation in a country of destination may change in the course of time, a full and *ex nunc* assessment [was] called for', the Court holds that 'there would be no violation of Article 3 of the Convention if the applicant were expelled from the Netherlands'. Indeed, 13 years after he left the D. R. Congo and nine years and a half since president Joseph Kabila succeeded his father, it would be hard to believe that the applicant 'would face a real and personal risk upon his return to his country of origin' (§ 50). This judgment is certainly more realistic than *N.* v. *Finland* (26 July 2005) in which, according to the Court, 'eight years after Mobutu's regime was toppled'[23] did not sufficiently diminish the risk of treatment contrary to Article 3 of the Convention.

– In *T.N., T.N. and S.N., S.S. and Others, P.K.* and *N.S.* v. *Denmark* (20 January 2011), the Court took particular care in emphasizing that those cases were 'clearly distinguishable' from *NA.* v. *the United Kingdom* (17 July 2008), in which it had prohibited the return to Sri Lanka of a Tamil who had been arrested several times, had been ill-treated, had scars from being beaten with batons on his body and whose arrest had been recorded.[24] The main factual difference taken into consideration was the end of hostilities between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan Army since 19 May 2009. Concerning more in particular the personal situation of the applicants, the Court noted that their involvement with the LTTE ended long ago and was only on a lower level (Ms T.N.; Mr T.N. and Ms S.N.; Mr. S.S. and Ms V.N. and their two children) or was not established (Mr N.S.) and that no arrest had been recorded (Ms T.N.; Mr T.N. and Ms S.N.; Mr P.K.).

– In *E.G.* v. *the United Kingdom* (31 May 2011), the applicant had been an active member of LTTE. However, his scars were not readily visible and not characteristic of having undergone LTTE training. There are no indications that his detention has been recorded. In this case too, the end of hostilities may be considered as the decisive factor.

[23] Dissenting opinion of Judge Rait Maruste (Estonia) attached to *N.* v. *Finland*. On that case, *see* Bossuyt (article), *supra* n. 1, p. 22-24.

[24] On *NA.* v. *the United Kingdom*, *see* Bossuyt (article), *supra* n. 1, p. 43-47.

According to Judges Lech Garlicki (Poland) and Zdravka Kalaydjieva (Bulgaria), the Court was confronted in this case with the following alternative:

> If the applicant is not deported, even if there is no genuine risk of ill-treatment, the United Kingdom would be compelled to tolerate an illegal immigrant it does not want to keep on its soil. If the applicant is deported and if the risk of ill-treatment is genuine, he would at best be exposed to inhuman and degrading treatment by the Sri Lankan authorities.

They believe that 'if the former scenario materialises, the United Kingdom is likely to survive [the Court's] mistake; whereas if the latter scenario comes true, the applicant may not survive'.

Their dissenting opinion is eloquently written but, if that standard would be accepted, it would constitute an important factor of attraction of ill-founded applications. It is up to the competent national authorities to assess, on the basis of their expertise and experience, the degree of probability that a particular individual will run a real risk of treatment contrary to Article 3 of the Convention in the territory of a non-State party. It is not always possible 'to predict precisely what would happen to [an] applicant on return'.[25] As stated by Judge Boštjan Zupančič (Slovenia) in his concurring opinion on *Saadi* v. *Italy*, 'one cannot *prove* a future event to any degree of probability'. However, this absence of certainty that is inherent in any speculation about the future may not be confused with the reasonable doubt that should benefit the applicant.

– In *J.H.* v. *the United Kingdom* (20 December 2011), there would be no violation of Article 3 of the Convention in the event of the removal to Afghanistan of the applicant, the son of a high-ranking member of the PDPA[26] who left Afghanistan in 1992. Considering that 'there are no indications that the general situation of violence in Afghanistan, and in particular Kabul '…', is at present of sufficient intensity to create a real risk of ill-treatment simply by virtue of his being exposed to such violence on return' (§ 55), the Court (§ 66) had particular regard to,

> *inter alia*, the lack of any evidence that the applicant's father still has any profile in Afghanistan; the length of time that has elapsed since his father, in any event, had left Afghanistan; the applicant's lack of individual profile in Afghanistan; and, critically, the absence of any recent evidence to indicate that family members of PDPA members would be at risk in Afghanistan in the present circumstances prevailing there.

[25] Cf. the experts on Bhutan in *S.H.* v. *the United Kingdom*, 15 June 2010, § 71, *see* text to n. 37 *infra*.

[26] The Communist People's Party of Afghanistan.

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– In its judgment *Al-Hanchi* v. *Bosnia and Herzegovina* (15 November 2011), the Court, taking the recent changes in Tunisia into account,[27] holds that there would be no violation of Article 3 of the Convention in the event of applicant's deportation to Tunisia. The Court considered that the reported cases of ill-treatment were 'sporadic incidents' and that there was 'no indication, let alone proof, that Islamists as a group, have been systematically targeted after the change of regime' (§ 44).

Judgments in line with the judgment *N.* v. *the United Kingdom*

– In two cases against Sweden (*Husseini*, 13 October, and *Samina*, 20 October 2011) concerning expulsions to Afghanistan and Pakistan, the Court considered a) that there were no indications that the situation in the country of destination is sufficiently serious to conclude that the return of the applicants[28] thereto would constitute, in itself, a violation of Article 3 of the Convention,[29] b) that the Swedish authorities had conducted a thorough examination of the case of the applicants, which were heard several times, assisted by appointed counsel,[30] c) that there were no indications that the authorities were wrong in their conclusions that the applicant would not be at risk being persecuted upon return[31] and d) that, as far as their mental health was concerned, their case did not disclose the very exceptional circumstances established by its case-law, with reference to its judgment *N.* v. *the United Kingdom*.[32]

– In *Husseini*, the Court observed that the applicant would not be sent back to his village or province of origin (§ 95). Referring to the UNHCR's Guidelines concerning 'Internal Flight or Relocation Alternative', the Court considered that 'an internal relocation alternative is available to applicant in Afghanistan' (§ 98). In his dissention opinion, joined by Judge Zupančič, Judge Dean Spielmann (Luxemburg) agrees with the majority that, in respect of an internal flight alternative, 'the person to be expelled must be able to travel to the area concerned, gain admittance and settle there', but he cannot support the majority view that there has been no violation of Article 3 of the Convention, since he does not find any support in the file that this issue has 'been examined separately and thoroughly by the domestic authorities'.

– In the case *Yoh-Ekale Mwanje* v. *Belgium* (20 December 2011), the Court holds that there would not be a(n indirect) violation of Article 3 of the Convention in

[27] The respondent Government had also stressed that, contrary to the case *Saadi* v. *Italy* (GC, 28 Feb. 2008), Mr Ammar Al-Hanchi was not a convicted terrorist (§ 36).

[28] Mr Aftab Husseini, an Afghan of mixed Hazara and Pashtun ethnicity, and Ms Yasmin Samina, a volunteer in a Christian organisation in Karachi.

[29] *Husseini*, § 84; *Samina*, § 50.

[30] *Husseini,* § 86; *Samina*, § 54.

[31] *Husseini*, § 90; *Samina*, § 55.

[32] *Husseini,* § 94; *Samina*, § 61.

the event Ms Khaterine Yoh-Ekale Mwanje, infected by HIV, would be removed to Cameroon, as her health condition is not in a critical state and she is able to travel (§ 83).[33] However, in a common partially concurring opinion, six[34] of the seven judges of the Chamber express the hope that the Court might one day review its case-law on this issue.[35]

The more controversial judgments

A few judgments based on the credibility of asylum seekers to be expelled and the judgments *M.S.S.* v. *Belgium and Greece*, *Sufi and Elmi* v. *the United Kingdom* and *M.S.* v. *Belgium* concerning the transfer or the expulsion of asylum seekers, are more controversial.

Judgments based on credibility

In four judgments, the credibility of the applicants is at issue. The competent national authorities did not give credit to their allegations, but the Court did. It is on the issue of the assessment of the reliability of the accounts given by the persons concerned that Judge Wilhelmina Thomassen (Netherlands) in her concurring opinion attached to *Said* v. *the Netherlands* (5 July 2005) stated that 'judges will to a certain extent '…' find themselves on thin ice'. In his dissenting opinion attached to *N.* v. *Finland* (26 July 2005), Judge Maruste stated that 'the domestic authorities are much better placed than international judges' to assess the credibility of asylum seekers. In her dissenting opinion attached to *R.C.* v. *Sweden* (9 March 2010), Judge Elisabet Fura (Sweden) also emphasized that '[d]omestic courts are normally better placed to do this than an international court, since they have had the opportunity to see and hear the parties' (§ 5). In that same judgment, the Court itself recognized that 'the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses' (§ 52). Nevertheless, in all four judgments, the Court, without seeing or hearing the applicants, substituted its own credibility assessment for that of the specialised national authorities.

The case *R.C.* v. *Sweden* (9 March 2010)

The Court found that the story of Mr R.C., an Iranian national, was consistent 'notwithstanding some uncertain aspects' (§ 52). Indeed, one of the three lay judges of the Swedish Migration Court also considered the application to be credible (§ 17). In the European Court too, one of the judges (Judge Fura) disagreed

[33] For a (direct) violation of Art. 3, *see* text between n. 113 and n. 116 *infra*.

[34] Danutė Jočienė (Lithuania), Françoise Tulkens (Belgium), Dragoljub Popović (Serbia), Işıl Karakaş (Turkey), Guido Raimondi (Italy) and Paulo Pinto de Albuquerque (Portugal).

[35] *See also* text between n. 125 and n. 127 *infra*.

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with the majority which considered that the forensic report, issued *after* the domestic authorities had finalised their examination, was enough evidence to outweigh the inconsistencies of the applicant's story. She was less assured than the majority to advise the domestic authorities on what conclusions to draw from certain evidence introduced in a case where she had 'not had the benefit of seeing the parties and in which the relevant events took place a long time ago'.[36]

The case *S.H.* v. *the United Kingdom* (15 June 2010)
The British Secretary of State and the Special Adjudicator raised several elements[37] casting doubt on the credibility of Mr S.H. Despite the alleged fact that the family of the applicant were declared non-nationals and ordered to leave Bhutan immediately, the Government of Bhutan issued travel documents allowing him to travel back from the United Kingdom to Bhutan. The Court was nevertheless satisfied, not on the basis of what it knew, but rather on the basis of what it did not know (Bhutan is a 'closed country', 'little information is available concerning its human rights situation' and 'none of the experts have been able to predict precisely what would happen to the applicant on return' (§§ 68-71), that there are substantial grounds for believing that there is a real risk for ill-treatment contrary to Article 3 of the Convention.

The case *N.* v. *Sweden* (20 July 2010)
The Swedish Immigration Board and Migration Board of Appeal had each rejected a) the asylum application of Ms N., b) her three (two for the Board of Appeal) successive applications for a residence permit and c) her application to re-evaluate her case. The Court finds nevertheless that there are substantial grounds to believe that, if deported to Afghanistan, she would face various cumulative risks of reprisals which fall under Article 3 of the Convention. The judgment illustrates, moreover, the broadening by the Court of the obligations of the States parties under Article 3 of the European Convention compared with those accepted by the States parties to the Geneva Convention as originally conceived: a) the alleged risk is not of persecution but of 'domestic violence';[38] b) the alleged risk does not emanate from the authorities of the State but 'from her husband X, her own

[36] Dissenting opinion of Judge Fura, §§ 7 and 9-10.

[37] He did leave Bhutan through normal immigration channels on his own passport; he did not seek leave to remain in India; his wages were paid while he was allegedly in detention; there is no evidence of arbitrary arrest or ill-treatment; his visa application mentions that he worked at the Ministry of Agriculture and not at the Bank; how could he work for two year at the Bank of Bhutan without the required certificate?

[38] A phenomenon unfortunately widespread even in societies where persons are not persecuted on grounds mentioned in the Geneva Convention.

family and from Afghan society';[39] c) the specific category of persons at risk is not the limited group of persons courageous enough to put their freedom or physical integrity at stake for their convictions but 80% of all women (or 40% of the total population) who, according to the Court, are currently victims of domestic violence in Afghanistan.

The case *Y.P. and L.P.* v. *France* (2 September 2010)
The applicants had requested asylum successively in Germany, Norway, France, Sweden, Denmark and Belgium. Their requests submitted in France in 2005 and again in 2008 have been twice rejected by the specialised French administrative authority (*l'OFPRA*) and by the competent asylum jurisdiction (the Appeals Commission for Refugees and, its successor, the National Court of the Right of Asylum). Because 'harassment of the opposition' persists in Belarus and their requests for asylum could be analysed as 'discrediting the Republic', the Court considers nevertheless that their expulsion would violate Article 3 of the Convention.

In none of the four judgments did the Court find any other violation of the Convention and the applicants either made no claim in respect of non-pecuniary damage (*R.C.* and *S.H.*) or that claim was dismissed (*N.* and *Y.P. and L.P.*). As far as the indirect violations of Article 3 of the Convention are concerned, in none of the four cases is the line of argument of the Court very solid. All those applicants did benefit from a correct procedure before competent national administrative authorities and jurisdictions specialised in the field. Of course, different judges may arrive at different conclusions. This does not only happen in matters of asylum. Undoubtedly, in all States parties to the Convention, every working day court decisions are rendered that other judges (European or national) would judge differently than has been done. That does not mean that the Convention is violated, despite the tremendous implications the difference (e.g., between an acquittal and a heavy sentence) may have for the person concerned.

In a statement made on 11 February 2011, the President of the Court stated that 'the Court is not an appeal tribunal for the asylum and immigration tribunals of Europe'. At its High Level Conference in Izmir on 26 and 27 April 2011, the Committee of Ministers of the Council of Europe recalled that 'the Court is not an immigration Appeals Tribunal or a Court of fourth instance'. On 7 July 2011, the President of the Court stated again that '[t]he Court is not an appeal tribunal from domestic tribunals'[40]. But what else is the Court doing when, in the four abovementioned judgments, it substitutes its own assessments and its own specu-

[39] This is a much larger category of 'persons or groups of persons who are not public officials' than the Colombian drug traffickers at issue in *H.L.R.* v. *France* (GC, 29 April 1997, § 40).

[40] Practice Direction on Requests for Interim measures, issued by the President of the Court in accordance with Rule 32 of the Rules of the Court on 5 March 2003 and amended on 16 Oct. 2009 and on 7 July 2011.

lations for the assessments and the speculations of the competent national authorities, without having heard or seen the applicants?[41]

Judgments raising a high number of questions
Three other judgments (*M.S.S.* v. *Belgium and Greece*, *Sufi and Elmi* v. *the United Kingdom* and *M.S.* v. *Belgium*) give rise to a high number of questions.

M.S.S. v. *Belgium and Greece* (GC, 21 January 2011)
The judgment *M.S.S.* v. *Belgium and Greece*[42] is the first[43] judgment concerning asylum seekers in which the Court found a State party (Belgium) indirectly responsible for returning an asylum seeker to another State party (Greece), because the conditions of his detention and his living conditions in that country were considered unacceptable.[44]

As far as Mr M.S.S.'s conditions of detention in Greece are concerned, Judge András Sajó (Hungary) disagreed with the majority of the Court in his partly dissenting opinion: a) with respect to the first detention for four days, he notes that, since the 'detention of transferred asylum seekers [was] not mandatory and there [was] no evidence in the file that such a practice [was] followed systematically', it was 'not foreseeable that the applicant would be detained, or for how long' (*M.S.S.*, p. 67); b) with respect to the second detention for seven days, he notes that, as stressed by the respondent Government, it resulted not 'from the applicant's asylum application but from the crime he had committed in attempting to leave Greece with false documents' (ibid., § 211).

As far as the applicant's living conditions in Greece are concerned, this judgment is, moreover, the first one in which the Court considered that the threshold of Article 3 of the Convention was met for holding States parties responsible for someone's living conditions.[45] Commenting already earlier on this judgment, the present author has raised the following question:

[41] In more recent judgments (*Husseini*, 13 Oct., and *Samina*, 20 Oct. 2011, v. *Sweden*), the Court gave due weight to the 'thorough examination' by the domestic authorities stressing that they had heard the applicants (*see* text to n. 30 *supra*).

[42] For more elaborate comments on *M.S.S.* v. *Belgium and Greece*, *see* M. Bossuyt, 'Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law', 5 *European Human Rights Law Review* (2011), p. 582-597.

[43] Except one case of extradition: *Shamayev and Others* v. *Georgia and Russia* (12 April 2005). In his dissenting opinion attached to that judgment, Judge Anatoly Kovler (Russia) observed that (up to then) 'the only examples of a finding of a potential violation of Article 3 in the event of extradition concerns extradition to a State that is not a signatory to the Convention'.

[44] For a direct violation of Art. 3 in *M.S.S.* by Greece, *see* text to n. 89 and between n. 95 and n. 98 *infra*.

[45] *See* text between n. 95 and n. 102 *infra*.

> How could Belgium, when it transferred M.S.S. to Greece on June 15, 2009 (three days before the *Budina* decision),[46] have foreseen that 18 months later (in its judgment in *M.S.S.* of January 21, 2011) the Court would consider that in six months time (since its *K.R.S.* decision of December 2, 2008)[47] the living conditions in Greece concerning asylum seekers had deteriorated to the point of violating art. 3 of the Convention and that the Court would fix the threshold for the application of that art. 3 to asylum seekers' living conditions, lower than usual [because of their status as members of 'a particularly underprivileged and vulnerable population group in need of special protection'[48] (ibid., § 251)]?[49]

In his partly dissenting opinion, Judge Nicolas Bratza (United Kingdom) also expressed the view that EU Member States were 'legitimately entitled to follow and apply the [*K.R.S.*] decision' (Bratza, § 6). He was unconvinced that 'any of the developments relied on in the [*M.S.S.*] judgment should have led the Belgian authorities in June 2009 to treat the [*K.R.S.*] decision as no longer authoritative' (§ 8) and he did also attach particular importance to the practice of the Court itself that had not considered it necessary to suspend, by applying interim measures, the applicant's transfer to Greece, nor the transfer (in the period between 1 June and 12 August 2009 alone) of 68 other Afghan nationals to Greece by seven EU Member States (§§ 13-14).

[46] In the decision *Budina* v. *Russia* of 18 June 2009, the Court had stated for the first time that it could not exclude that state responsibility could arise for '"treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'. However, in the circumstances of that case, the Court was not persuaded that 'the high threshold of Article 3 [had] been met'.

[47] Despite complaints by the Iranian applicant about the deficiencies in the asylum procedure in Greece, the Court had considered in the decision *K.R.S.* v. *the United Kingdom* that 'in the absence of proof to the contrary, it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed in Greek law, and that it would comply with Article 3 of the Convention' (*M.S.S.*, § 343).

[48] Judge Sajó considers that 'asylum seekers are far from being homogenous, if such a group exists at all' (ibid., p. 64) and that 'they cannot be unconditionally considered as a particularly vulnerable group' (ibid., p. 63), because 'they are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion'. Very recently, also after Belgium transferred M.S.S. to Greece, the Court had recognized other groups, namely Roma (*Oršuš and Others* v. *Croatia*, GC, 16 March 2010, § 147: 'as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority') and mentally disabled persons (*Alajos Kiss* v. *Hungary*, 20 May 2010, § 42 : 'a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled') as particularly vulnerable. In doing so, the Court is shifting from the protection of the 'civil rights' of the universal human being taking into account his most essential characteristics, towards the protection of 'social rights' of specific categories of human beings having particular needs.

[49] Bossuyt, *supra* n. 42, p. 594.

In *M.S.S.* (§ 286), the Court also stated that 'it does not itself examine the actual asylum applications'. This is certainly contrary to what the Court did in most of its previous judgments in which it found an indirect violation of Article 3 of the Convention. In the words of the Court now, 'its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled' (ibid.). It remains to be seen whether this statement really announces a reversal of its practice in this matter. Indeed, verifying whether such effective guarantees exist, because the State party concerned has set up specialised bodies applying correct procedures 'in conformity with the legal and regulatory requirements, including those imposed by the Convention as interpreted by the Court',[50] is not the same as checking whether in the case at issue the Court would have come to the same conclusion as the competent national authority.

In an earlier comment on this judgment, the present author concluded:

> [I]nsofar the Court found a violation by Belgium for applying the Dublin Regulation,[[51]] it has implications for the European Union, its Member States and the states belonging to the Schengen area. '…' The proper functioning of the Schengen system, which provides for the removal of systematic border controls between most EU Member States, is hardly compatible with a partial applicability of the Dublin Regulation. '…' It is obvious that it is not up to '…' judges to take such a grave decision but to the governments of the states concerned and to the competent EU organs. '…' There is a big difference between making non-binding policy recommendations to states on the basis of reports by non-governmental-organisations, the Commissioner for Human Rights of the Council of Europe and the UN High Commissioner for Refugees, and adopting legally binding judgments that hold states responsible for violations of internationally guaranteed human rights in individual cases.[52]

[50] Bossuyt (article), *supra* n. 1, p. 46.

[51] The Dublin Regulation (Council Regulation EC No. 343/2003) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national applies to all Member States of the European Union, as well as Norway, Iceland and Switzerland. In its judgment of 21 Dec. 2011 in the cases C-411/10 and C-493/10, the Court of Justice of the European Union has ruled that European Union law precludes the application of a conclusive presumption that the responsible Member State observes the fundamental rights of the European Union: 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" […] where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision' (emphasis added).

[52] Bossuyt, *supra* n. 42, p. 597.

Sufi and Elmi v. *the United Kingdom* (28 June 2011)

The judgment *Sufi and Elmi* v. *the United Kingdom* is drafted with particular care and exploits a wealth of sources of information concerning the factual situation in Somalia. From the legal point of view, it is based on two previous judgments of the Court: *Saadi* v. *Italy* (GC, 29 January 2008) and *NA.* v. *the United Kingdom* (GC, 17 July 2008). There is nevertheless an essential difference between the case *Saadi* v. *Italy* and the case *Sufi and Elmi* v. *the United Kingdom*. In *Saadi* v. *Italy*, as a matter of principle, everybody could be returned to Tunisia, except persons, such as Mr Nassim Saadi, condemned for, or at least being suspected of, membership of terrorist organisations. In *Sufi and Elmi* v. *the United Kingdom*, hardly anybody can be returned to southern and central Somalia, not even persons, such as Mr Abdisamad Sufi and Mr Abdiaziz Elmi, with an impressive criminal record, since the prohibition to return someone to Somalia imposed by the Court is absolute: 'irrespective of the victims' conduct, ["however undesirable or dangerous"], the nature of the offence allegedly committed by the applicants is irrelevant for the purposes of Article 3' (§ 212). In addition, in the case of *Sufi and Elmi*, the offences are not 'allegedly' committed, but the applicants have been condemned several times for having effectively committed a variety of offences.[53] It is, in particular, the combination of *Saadi* v. *Italy* with *NA.* v. *the United Kingdom* which raises a number of questions.

The latter judgment (*NA.* v. *the United Kingdom*) can hardly be considered the pilot judgment which was expected in the light of the 342 interim measures taken by the Court against the United Kingdom concerning Sri Lankan Tamil asylum seekers (§§ 22-23). As noted already, '[t]he judgment deals with the case as a strictly individual one which allows only to conclude that, when certain very specific circumstances are present, the person concerned may not be expelled to Sri Lanka'.[54] In its *NA.* judgment (§ 115), however, the Court also stated that it had 'never excluded the possibility that a general situation of violence in a country of destination [would] be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention'. The Court emphasized that it 'would adopt such an approach *only in the most extreme cases of general violence*,[55] where there was a real risk of ill-treatment simply by virtue of

[53] Mr Abdisamad Sufi (24 years old) has over a period of 5 years (2005-2009) been sentenced four times to a total of 4 years and 3 months' imprisonment for offences, such as burglary, death threats, indecent exposure and, again, burglary and theft (§ 14). Mr Abdiaziz Elmi (42 years old) has over a period of 12 years (1996-2008) been sentenced six times to a total of 11 years and 9 months' imprisonment for offences, such as handling stolen goods, robbery, theft, supplying cocaine and heroin, again burglary and theft, and possession of a Class A drug (§§ 21 and 26).

[54] Bossuyt, *Int.Am. & Eur.Hum.Rts. J.*, *supra* n. 1, p. 45.

[55] Emphasis added.

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an individual being exposed to such violence on return'. However, in the *NA.* judgment, it was not the general situation of violence, but a 'number of factors present in applicant's case '…' taken cumulatively' that constituted the basis for the Court to find that 'at the present time there would be a violation of Article 3 if the applicant were to be returned' (§ 147). In *Sufi and Elmi*, the destinations the applicants are likely to be repatriated to, constitute, according to the Court, such 'most extreme cases of general violence'.[56]

Despite its ambition to adopt a lead judgment applicable to the many thousands of Somali asylum seekers present in the territory of the 47 States parties to the Convention, the judgment invokes also arguments very specific to the two applicants and not likely to be transposed to most other Somali asylum seekers. Indeed, the Court considers it 'unlikely that a Somali with no recent experience of living in Somalia would be adequately equipped to "play the game"' and avoid the attention of al-Shabaab by obeying their rules. The Court considers that this risk would be even greater for Somalis 'who have been out of the country long enough to become "westernized" as certain attributes, such as a foreign accent, would be impossible to disguise' (§ 275). Fortunately for him in this context, the second applicant had submitted that '[h]e wore an earring' and that he had 'a thoroughly "London" accent' (§ 305).

It seems that 'the most extreme cases of general violence' must be understood as a general situation of violence which constitutes a real risk of ill-treatment for any individual exposed to it simply by virtue of his presence in that country. According to the Court, everybody in that country, or at least everybody not exceptionally well-connected to 'powerful actors' in southern and central Somalia, including Mogadishu, risks ill-treatment contrary to Article 3 of the Convention.

My comment would be that such general decisions are very far reaching and, unlike individual decisions are better left to Governments which are more suitable than judges (and *a fortiori* international judges) to bear its consequences. The point is not that in the case of Somalia the decision by the Court is lightly taken and that there are no good grounds for a Government of a State party to the Conven-

[56] The Court considers a) with respect to Mogadishu, that 'the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to *anyone* in the capital' (§ 248) and that '*anyone* in the city, except possibly those who are exceptionally well-connected to "powerful actors", would be at real risk of treatment prohibited by Article 3 of the Convention' (§ 250); b) with respect to southern or central Somalia (outside Mogadishu), that 'a returnee with no recent experience of living in Somalia would be at real risk of being subjected to treatment proscribed by Article 3 in an Al-Shabaab controlled area' (§ 277); and finally, c) with respect to the Internal Displaced Persons settlement in the Afgooye Corridor and in the Dadaab refugee camps in Kenya, that the conditions in both places are also 'sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention' (§ 291).

tion to take such a decision, but that this kind of general decisions[57] should be taken by Governments themselves, taking into account the consequences it may entail for their capacity to accommodate asylum seekers from such a country and keeping the necessary flexibility to adapt their policy to the changing circumstances in the country of origin.[58]

An absolute and general prohibition imposed by the Court implies that, whatever the numbers of persons having the nationality of that country and arriving in the territory of whatever State party to the Convention and whatever their personal history – even if they have been engaged in terrorist activities or piracy – and whatever crimes they commit in that State party, they must, once they have succeeded in entering the territory of a State party to Convention, be authorized to stay there. Because the Court has considered, in its judgment *M.S.S.* v. *Belgium and Greece*, that asylum seekers are members of 'a particularly underprivileged and vulnerable population group in need of special protection', the State party they have chosen as their country of destination must moreover ensure that they all enjoy decent living conditions.

The general applicability of this judgment contributes to the complexity[59] of the issues the Court is treating ever more profoundly since its first judgment on asylum seekers in 1991 *(Cruz Varas and Others)* and particularly since 2005 when deciding in *Mamatkulov and Askarov* that the interim measures it had indicated

[57] Even in the framework of the interim measures procedure, the Court came close to ordering a general prohibition to return anybody to Sri Lanka or to central Iraq: in October 2007, the Registrar of the Fourth Section informed the UK Government that Rule 39 would continue to be applied in every case concerning the removal of Tamils to Sri Lanka (*NA.* v. *the United Kingdom*, 17 July 2008, § 21); for one month (starting on 22 Oct. 2010), the Court applied Rule 39 in respect of all requests against the Netherlands, Sweden and the United Kingdom, made by applicants seeking to prevent their return to central Iraq.

[58] It would seem to be more compatible with the Separation of Powers principle if the judiciary controls the decisions taken on individual applications but would leave the general policy decisions to governments. Even in countries where the asylum determination authorities are independent, it is still up to the government – and not to those authorities or to the asylum judges – to take the decision whether, when and how an asylum seeker will be effectively repatriated after the rejection of his application. It is not because the national authorities competent in asylum matters do not oppose to the repatriation of an asylum seeker to his country of origin, that the government has the obligation to do so. Moreover, many governments do not even have the means to remove someone to a country such as Somalia.

[59] *See also* the questions raised in Bossuyt, 'Strasbourg et les demandeurs d'asile (*M.S.S.* c. *Belgique et Grèce* et *Sufi et Elmi* c. *le Royaume-Uni*)', *Annuaire international des droits de l'homme* (2012) vol. VI (Immigration en Europe et droits de l'homme), p. 663-676.

under its Rule 39[60] had become binding.[61] In this context, it is not without relevance to note that in 80% (40/50) of the above commented judgments the Court has indicated interim measures. This is the case with 15 judgments concerning expulsions (13) or extraditions (2) in which the Court found no indirect violation of Article 3 of the Convention, in 11 of the 14 judgments[62] concerning extraditions and in 14 of the 21 judgments[63] concerning expulsions in which the Court found such an indirect violation.

This author's comment on this judgment started by expressing appreciation for the high quality of the research undertaken with respect to a country confronted with an exceptionally difficult human rights situation. Nevertheless, he expressed already previously doubts on whether the Court is 'really exercising the role entrusted to it, when it endeavours in collecting all sorts of reports of national, international or non governmental organs on the human rights situation in States non-parties to the Convention?'[64] With respect to those reports, Katayoun Sadeghi,[65] considers 'problematic' the reliance of the Court on factual determinations made by international institutions and non-governmental organizations, especially with regard to fact-intensive cases.[66] In his opinion, the Court relies 'heavily', 'uncritically' and 'in an *ad hoc* manner' on secondary sources.[67] However, even '[h]ighly regarded institutions have their own sets of interests and motivations, have a tendency to make factual errors when dealing with difficult

[60] Rule 39, § 1, of the Rules of Procedure of the Court reads as follows: 'The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it'. The indication is normally given by the President of the Chamber to which the application is allotted or by the President of the relevant section and mostly on the day they have been requested or the day after, without giving the respondent Government the opportunity to let its views be known.

[61] On *Mamatkulov and Askarov* v. *Turkey*, *see* Bossuyt (article), *supra* n. 1, p. 14-21; *see also* F. Krenc, *Les mesures provisoires devant la Cour européenne des droits de l'homme: Un référé à Strasbourg* (Larcier 2011), 152 p.

[62] The exceptions are *Kaboulov* v. *Ukraine* (19 Nov. 2009), *Iskandarov* (23 Sept.) and *Sultanov* (4 Nov. 2010) v. *Russia*.

[63] The exceptions are *Z.N.S.* (19 Jan.), *Charahili* (13 April) and *Dbouba* (13 July) v. *Turkey*, *S.H.* v. *the United Kingdom* (15 June 2010), *M.S.S.* v. *Belgium and Greece* (GC, 21 Jan.), in which case the indirect violation concerned Belgium but the interim measures concerned Greece, *Auad* v. *Bulgaria* (11 Oct. 2011) and *M.S.* v. *Belgium* (31 Jan. 2012).

[64] Bossuyt (article), *supra* n. 1, p. 47, n. 271.

[65] K. Sadeghi, 'European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-Finding', 25 *Connecticut Journal of International Law* (2009-2010), p. 127-151.

[66] Ibid., p. 127.

[67] Ibid., p. 128.

circumstances, and often are not subject to oversight or other forms of accountability'.[68]

As far as two Iranian cases are concerned, Sadeghi considers that the Court did not take into account that 'the burden of proof for adultery in Iran is very high'.[69] The Court utilized also 'an uncited, flawed translation of Article 94 of the Islamic Penal Code of Iran' which seems 'to be incorrect in several ways'.[70] Moreover, the inconsistency of the Court by affording 'the UNHCR's findings substantial weight' in *Jabari* v. *Turkey* (11 July 2000),[71] while in *D and Others* v. *Turkey* (22 June 2006),[72] the Court 'dismissed and directly contradicted the UNHCR's fact-finding', 'undercuts the appearance and, perhaps, the reality of the fairness and equity of the Court's decisions' and 'leaves parties with little guidance regarding the process of ascertaining facts'.[73]

As far as 'Dubious Secondary Source Usage' is concerned, Sadeghi refers particularly to

a. the US State Department,[74] which has a 'very antagonistic relationship' with Iran, 'has been known to use flawed fact-gathering techniques and has reported incorrect information in the past'. Its 'human rights reporting still manifests political bias' and has been criticized 'for exaggerating the extent of human rights abuses in states at political odds with US';[75]
b. Amnesty International, which is, though 'highly respected', 'an overtly political group that engages in lobbying and other forms of activism to promote its agenda [and …] to increase international pressure on Iran to undertake reform'. As well as other NGOs, it 'depends on donations for funding', is 'unregulated and operate[s] largely unchecked by outsiders';[76]
c. UNHCR, which is 'a more broadly based humanitarian organization', has 'a different mandate than the Court and is motivated by its own interests. Of

[68] Ibid., p. 134.

[69] '[A] confession from the accused, the testimony of four male witnesses, or the testimony of three male and three female witnesses. Furthermore, only blood or marital relatives can bring charges of adultery, unless the adultery took place in public', ibid., p. 135.

[70] Ibid., p. 140-141.

[71] UNHCR had recognized Ms Hoda Jabari as a refugee because she alleged to be prosecuted in Iran for adultery which could lead to flagellation and stoning.

[72] UNHCR considered that the condemnation of Ms P.S. for fornication, because she was married with Mr A.D. in violation of the Shiite Shari a, would be reduced to a symbolic sanction due to her health condition.

[73] Sadeghi, *supra* n. 65, p. 146 and 148-149.

[74] In his separate opinion attached to *Said* v. *the Netherlands* (5 July 2005), Judge Loukis Loucaidis (Cyprus) also criticised reliance on the reports on human rights practices of the US Department of State, 'a purely political government agency' (p. 14).

[75] Sadeghi, *supra* n. 65, p. 136-138.

[76] Ibid., p. 142-143.

> greatest concern are the political and strategic motivations of the UNHCR, and the pressure applied to it by UN Member States and host states'.[77]

One of the difficulties when examining human rights situations in non-States parties is that those situations are often 'quite volatile'. The present judgment is a confirmation of this. Less than six weeks after the judgment *Sufi and Elmi* was rendered, it was reported that on 6 August 2011 the Al-Shabaab Islamist rebels had pulled out of all positions in the Somali capital of Mogadishu. Since the Court has linked the risk of ill-treatment to 'Al-Shabaab controlled area' to which Mogadishu does not belong anymore, the basis for prohibiting the United Kingdom the return of the applicants to Mogadishu is gone.

M.S. v. *Belgium* (31 January 2012)

The applicant, an Iraqi national born in 1976, arrived in Belgium on 15 November 2000. Suspected of links with the terrorist organisation Al-Qaida, of participation in providing false documents in order to infiltrate Islamists in Europe and of acting as a smuggler of clandestine immigrants in Belgium, he was arrested on 21 May 2003. He was sentenced in Brussels to five years of imprisonment, reduced on appeal to 54 months (§§ 12-15). His (second) request for asylum submitted on 2 November 2007, two days before his scheduled repatriation to Iraq (§§ 25-26), was rejected on 2 February 2009 and on appeal on 4 March 2009, in application of the exclusion clause of the Geneva Convention (§§ 42-47).

Upon his release from prison on 27 October 2007, he had been detained in closed centres until 4 March 2009, when he was confined to his residence. After he was placed again in a closed centre on 2 April 2010, the Belgian authorities tried to find asylum for him in different countries without success (§§ 71-74). After negotiations with the Belgium authorities, he proposed that EUR 50,000 be paid to him for his acceptance to return to Iraq. After having reduced his proposal to EUR 10,000, he was repatriated to Iraq on 27 October 2010 (§§ 92, 99 and 107). Upon his arrival, he was detained during three weeks in the prison of Erbil ('capital of Kurdistan') and on 23 November 2010 liberated under bail and confined to his residence (§§ 110-111).

The Court considered that, as he was deprived of his liberty and the Belgian authorities had exercised coercion upon him to dissuade him or at least to discourage him to remain in Belgium, the conditions of free consent were not fulfilled (§ 124). Consequently, the applicant could not be considered to have validly renounced the protection offered to him by Article 3 of the Convention (§ 125). As to the merits, the Court considers that the process of return of the applicant should have been accompanied by a minimum of safeguards ensuring his security

[77] Ibid., p. 144.

and among them in the first place the search of diplomatic assurances from the State concerned. Because the Belgian authorities had not done what could reasonably be expected from them in light of the Convention, there has been a violation of Article 3 of the Convention (§§ 131-132).

In the present author's view, there seems to be a misunderstanding as to the 'voluntary' return of a rejected asylum seeker. Once an alien is found staying illegally in the country and a decision ordering him to leave the country has been taken, he is not 'free' anymore to leave or not that country. He is under the legal obligation to do so. This was the case since 28 August 2006 (§ 11) and confirmed by the Aliens Tribunal on 4 October 2010 (§ 63). The question should not be whether he returned 'freely' to his country but whether force has been used in returning him. As this has not been the case, it is erroneous to speak about a 'forced return' (§ 125). No force on his person has been used and it may be assumed that he has received the EUR 10,000 he requested in order to ensure his defence in compensation of which he accepted to return voluntarily to his country (§§ 92 and 99).[78] To accept EUR 10,000 and then to complain about the very serious and frightful penalties and treatment that he must expect (§§ 93 and 106) is a behaviour that should not be rewarded. Moreover, he was not entitled to stay in Belgium – as recognized by the Court (§ 196) – and the Belgian authorities had good security reasons 'to dissuade him or at least to discourage him to remain in Belgium' (§ 124).[79]

The insistence on diplomatic assurances is surprising. In the past, the Court has generally been very distrustful of such assurances obtained by the defendant governments.[80] A striking exception is the (very recent) judgment *Othman (Abu Qatada)* v. *the United Kingdom* (17 January 2012).[81] In that judgment, the Court

[78] On 6 Oct. 2010, he explained that he needed the money to pay his lawyers and to corrupt his judges as well as to ensure his subsistence and that of his family during his detention (§ 96).

[79] Amnesty International, on the contrary, had tried to dissuade him to leave (§ 98).

[80] *See* the judgments concerning the extradition or the expulsion of asylum seekers envisaged or implemented to Tunisia or to States belonging formerly to the Soviet Union. For an inventory of the elements taken into account by the Court with respect to assurances given by governments of countries of destination, *see Othman (Abu Qatada)* v. *the United Kingdom*, 17 Jan. 2012, § 189.

[81] On the basis of a Memorandum of Understanding signed by the British and Jordanian Governments concerning assurances regarding the treatment of persons to be expelled to Jordan, the Court has decided that the deportation of the applicant, suspected of links with Al-Qaida, would not be in violation of Art. 3 of the Convention. However and contrary to its finding in *Mamatkulov and Askarov* v. *Turkey* (GC, 4 Feb. 2005), the Court holds that his deportation to Jordan would be a violation of the right to a fair trial guaranteed by Art. 6 of the Convention 'on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons'. It is the first time that the Court attributes extraterritorial effects to Art. 6 of the Convention. This judgment prompted the British Prime Minister to state before the Parliamentary Assembly of the Council of Europe in Strasbourg on 25 Jan. 2012 that 'you can end up with someone who has no right to live in your country, who you are convinced – and have good reason to be convinced –

had nevertheless stated that it is not for it 'to rule upon the propriety of seeking assurances' (§ 186). In the case of M.S., diplomatic assurances would not have been very appropriate since the applicant had expressed the wish that no contact should be established with the Embassy of Iraq concerning his return (§ 95).[82] Moreover, there has always been question of sending him back to the North of Iraq which is under the authority of the Regional Government of Kurdistan. Should one have contacted the diplomats – if any – of that regional government? What would be the value of diplomatic assurances of the central Government of Iraq in territory of the Regional Government of Kurdistan?[83] Moreover, concerning a person that pretends running a real risk of persecution by his national authorities, one should avoid as much as possible to establish contacts with those authorities. This is certainly the case when such contacts could be avoided since the applicant was already in the possession of the necessary travel documents.

The most important no doubt is that there is no element that demonstrates that upon his return he was subjected to inhuman or degrading treatment. In itself and, as far as necessary, taking into account the applicant's profile, a deprivation of liberty during three weeks, even followed by a confinement to his residence, does not reach the threshold of severity required by Article 3 of the Convention.[84] In the absence of inhuman or degrading treatment inflicted upon the applicant, there should be no finding of a violation of Article 3 of the Convention.

Judgments concerning a direct violation of Article 3

In previous judgments, the Court had already found direct violations of Article 3 of the Convention in the way asylum seekers deprived of their liberty[85] were treated by Belgium and Greece.[86]

means to do your country harm. And yet there are circumstances in which *you cannot try them, you cannot detain them and you cannot deport them*' (emphasis added).

[82] Even assuming that it is not legitimately possible to validly renounce the protection given by Art. 3 of the Convention (§ 123), it is nevertheless surprising that the Court considers that the wish expressed by the applicant should not be taken into account (§ 131).

[83] The Court itself observes that such assurances would not dispense it from examining whether they did provide a sufficient guarantee (ibid.).

[84] Not knowing at the time of the judgment whether he will be retried and found guilty (§ 130) falls, in our opinion, outside the scope of Art. 3 of the Convention. For more comments on this case, *see* M. Bossuyt, '"You cannot try them, you cannot detain them and you cannot deport them"' (Observations sous C.E.D.H, *M.S.* c. *Belgique*, 31 janvier 2012), *Journal des Tribunaux* (2012), p. 351-355.

[85] In *Amuur* v. *France* (25 June 1996), the Court considered that, despite the possibility for the applicants, four Somali nationals, to leave for another country the transit zone where they were held, the restrictions imposed upon them were equivalent to a deprivation of liberty (§ 49).

[86] The only other previous judgments concerning asylum seekers in which the Court found a direct violation of Art. 3 of the Convention are *Shamayev and Others* v. *Georgia and Russia*, 12 April

As far as Greece was concerned, the applicant in *Dougoz* (6 March 2001), a Syrian national, had been 'confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard to exercise' for 17 months (§ 45), and the applicant in *S. D.* (11 June 2009), a Turkish national, had been confined 'to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products' (§ 51) and for six days to a place 'with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet' (§ 51).[87]

As far as Belgium was concerned, the (second) applicant in *Mubilanzila Mayeka and Kaniki Mitunga* (12 October 2006), a five-year-old Congolese girl, had been retained for two months in a centre designed for adults (§§ 50-58) and the applicants in *Riad and Idiab* (24 January 2008), two Palestinians, had been left in the transit zone of the airport for 17 days (§§ 104-107).

The non-controversial judgments

Some of the more recent judgments finding a direct violation of Article 3 of the Convention give no cause for criticism. This is the case for *Tabesh, A.A.* and *R.U.* v. *Greece*, *Al-Agha* v. *Romania* and *Charahili* v. *Turkey*:

– Mr Rafk Tabesh, an Afghan national, who entered Greek territory in July 2006 without a permit, was arrested on 28 December 2006 and detained for three months in the premises of the border police of Thessaloniki in overcrowded cells confronted with a total lack of physical exercise and contact with the outside world, hygienic problems and insufficient catering (*Tabesh* v. *Greece*, 26 November 2009, § 33);

– Mr Akram Al-Agha, a Palestinian refugee, was placed in the retention centre of Bucharest airport for three years and five months and in bad hygienic conditions, poor quality of food and an access to showers limited to once every two weeks for two years and a half (*Al-Agha* v. *Romania*, 12 January 2010, § 66);

– Mr Malek Charahili, a member of the Tunisian organisation *Ennahda,* was detained for almost 20 months in the basement of a police station designed to hold persons in police custody for a maximum period of four days (*Charahili* v. *Turkey*, 13 April 2010, § 76);

– Mr A.A., a Palestinian refugee, was detained for three months in 'an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities

2005 (*see* n. 44 *supra* and text to n. 95 *infra*) and *Hussain* v. *Romania*, 14 Feb. 2008, in which the Court found such a violation '*sous son volet procedural*' (under its procedural aspect) (*see* Bossuyt (book), *supra* n. 1, p. 114).

[87] As quoted in *S.M.S.*, § 222.

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rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions'.[88] The Court holds that there has been a violation of Article 3 also due to the lack of diligence of the authorities in providing Mr A.A. with appropriate medical assistance (*A.A.* v. *Greece*, 22 July 2010, §§ 21-25);

– Mr R.U., a Turk of Kurdish origin, was detained for more than two months in the same retention centres, during the same period (more than two months) and in similar conditions as in the case *S.D.* v. *Greece* (*R.U.* v. *Greece*, 7 June 2011, §§ 62-63).

The controversial judgments

Nine other judgments raise a number of questions. This is the case with *Muskhadzhiyeva and Others, Kanagaratnam and Others* and *Yoh-Ekale Mwanje* v. *Belgium*, *Tehrani and Others* v. *Turkey*, *M.S.S.* v. *Belgium and Greece*, *Rahimi* v. *Greece*, *Sufi and Elmi* v. *the United Kingdom*, *Ergashev* v. *Russia* and *Popov* v. *France*. The criticisms relate to 1) the length of the time the applicants were exposed to conditions considered contrary to Article 3 of the Convention, 2) the living conditions of the applicants and 3) the lowering of the threshold for inhuman treatment when asylum seekers are deprived of their liberty making the exception envisaged in Article 5, § 1, (f) of the Convention, in certain circumstances, almost impossible to apply.

The length of time the applicants were exposed to 'unacceptable conditions'

In the five non-controversial judgments commented on above, the applicants had been exposed to 'unacceptable conditions' for 2 years and a half, 1 year and 8 months, 3 months (in two cases) or 2 months. The applicants in the judgments criticized below were exposed to such conditions for 4 and 7 days (*M.S.S.*), 4 days (*Ergashev*), 2 days (*Rahimi*) or (maybe only) 2 hours (*Tehrani and Others*).

The case *M.S.S.* v. *Belgium and Greece*

After his transferral, according to the Dublin Regulation, by Belgium to Greece, the applicant in *M.S.S.*,[89] an Afghan interpreter, was placed immediately in detention

> in a building next to the airport, where he was locked up in a small place with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor. (§ 34)

[88] As quoted in *M.S.S.*, § 222.

[89] *See* text between n. 42 and n. 52 *supra*.

Having attempted to leave Greece six weeks later with false papers, he was again placed in detention for seven days in the same building next to the airport (§§ 44-45). Taking into account that 'the applicant, being an asylum seeker, was particularly vulnerable', the Court does not regard 'the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant' (§ 232). However, as stressed by the respondent Government, his second detention for seven days did not result 'from the applicant's asylum application'. Consequently, the duration to be taken into account is four days. It is hard to believe that such conditions lasting for only four days, are absolutely prohibited by Article 3 of the Convention.

The case *Ergashev* v. *Russia*

In view of his extradition to Uzbekistan, Mr Urinboy Ergashev, an Uzbek mullah, had to endure detention in an office of the St-Petersburg department of the Interior for four days (3-7 March 2009). His cell, designed for short-term administrative detention not exceeding three hours, did not have a toilet or a sink and was solely equipped with a bench (§ 131). Despite the absence of 'any positive intention to humiliate or debase the applicant during the detention', the Court considers, in its judgment *Ergashev* v. *Russia* (20 December 2011), that 'the conditions of detention which the applicant had to endure for four days must have caused him distress and hardship and aroused him feelings of anguish and inferiority capable of humiliating and debasing him' (§§ 133-134). According to the Court, Article 3 of the Convention was also violated on account of the inhuman and degrading conditions of applicant's detention during more than five months (7 March-14 August 2009) in the remand prison in St-Petersburg, where he had at his disposal less than three square metres of personal space and was obliged to live, sleep and use the toilet in the same cell as so many other inmates (§§ 141-143).

The case *Rahimi* v. *Greece*

Mr Reivas Rahimi,[90] a 15 year old Afghan national, was detained in the retention centre for clandestine immigrants of Pagani on the island of Lesbos for two days. He complained about serious problems of overcrowding, hygiene and lack of contact with the outside world. Since the applicant, due to his age and his personal situation, was in a situation of extreme vulnerability and the conditions of accommodation, hygiene and infrastructure were so serious as to infringe the proper meaning of human dignity, the Court considers that they constitute, in themselves and without taking into consideration the length of his detention (two days), degrading treatment contrary to Article 3. According to the Court, the

[90] *See also* text between n. 98 and n. 100.

failure of the authorities to take care of him following his release constitute also a degrading treatment (*Rahimi* v. *Greece*, 5 April 2011, § 86).

Despite his young age and the fact that, according to the Court, he was not accompanied (§§ 63, 66 and 73), Mr R. Rahimi had succeeded, without having the required travel documents, to travel from Afghanistan to the island of Lesbos in Greece.[91] The judgment of the Court implies that the Greek State should be organized to be capable of ensuring decent accommodation for asylum seekers on whatever island they choose to land, even if they arrive without notice and without authorisation. A failure to do so, even for only two days in the case of minors, is considered to be a violation of the absolute prohibition contained in Article 3 of the Convention. Is this not stretching that absolute prohibition beyond any reasonable interpretation?

The case *Tehrani and Others* v. *Turkey*

In *Tehrani and Others* (13 April 2010), the finding of the Court is based on photographs, presented by the applicants, three PMOI members,[92] of the inside of a room at the Tunca Accommodation Centre showing 'an uncountable number of men lying on the floor within touching distance of each other or sitting on blankets' and during meal-time men sitting elbow to elbow on the floor, giving an overall image of 'excessive crowding as well as a consequent lack of general orderliness and hygiene' (§ 92). Even assuming that, as explained by the respondent Government, those photographs must have been taken 'during a two-hour period when the newcomers were gathered for pre-interview, interview and medical screening stages, following which they would have been settled in their rooms', the Court agrees with a NGO report that such conditions 'are unfit for human habitation even for a duration as short as two hours' (§ 93).

As far as the material conditions in the Kirklareli Accommodation Centre, also in Turkey, are concerned, the Court found, on the other hand, in its judgments *Z.N.S.* v. *Turkey* of 19 January 2010 (§§ 85-86) and *Alipour and Hosseinzadgan* v. *Turkey*[93] of 13 July 2010 (§§ 72-73), also on the basis of photographs submitted by the applicants, that it had not been established that those conditions were 'so severe to bring them in the scope of Article 3 of the Convention'. After having

[91] There are 6000 islands and islets belonging to Greece, of which 227 are inhabited. Lesbos is at 5.5 km from the coast of Turkey.

[92] The applicants who were detained at the Tunca Accomodation Centre are Mr Mohammad Tehrani, Mr Nader Mahrand and Mr Parviz Shorehdel.

[93] Mr Mohammad Alipour, an Iranian veterinary surgeon, who arrived in Turkey on 28 Nov. 2000, was granted refugee status under the UNHCR's mandate on 6 February 2008. He was arrested one month later and placed in the Kirklareli Accommodation Centre until he was authorized two years later to leave Turkey for Sweden. Ms Raha Hosseinzadgan had withdrawn her application because she had been granted refugee status in Sweden (§ 46).

expressed, in his partly dissenting opinion attached to *Tehrani and Others*, the view that 'the evidence produced does not provide sufficient information concerning the amount of personal space available', Judge Sajó considered that 'an on-site inspection would seem to be appropriate, especially in the absence of any conclusive finding by a Council of Europe body'. Indeed, the photographs submitted by the applicants seem to be a rather shaky basis to find a violation of Article 3 of the Convention. But, foremost, to be confronted with such conditions for two hours does not correspond to what must be considered absolutely prohibited by Article 3 of the Convention.

Of course, even a few minutes of torture is absolutely prohibited and any inhuman treatment should not last long in order to be contrary to Article 3 of the Convention. In *Shamayev and Others* v. *Georgia and Russia* (12 April 2005), the Court found a violation of Article 3 of the Convention, considering that the applicants had been subjected for one single night 'to physical and mental suffering of such a nature that it amounted to inhuman treatment' (§ 385). The problem is that the Court has extended the applicability of Article 3 of the Convention to a variety of forms of 'ill-treatment'. It seems to forget that the threshold should remain high enough to meet the standard of an absolute prohibition, not allowing for any restriction, any exception, nor any derogation, not even '[i]n time of war or other public emergency threatening the life of the nation'.[94] It is hard to believe that the exposure for two hours to the conditions in the Tunca Accommodation Centre reaches that level.

In *M.S.S.*, the Court considered that, 'the applicant, being an asylum seeker', a period of a few days was sufficient to constitute a violation of Article 3 of the Convention. In its previous judgments against Greece (*S.D.*, *Tabesh* and *A.A.*), the Court also took into account the fact that the applicants were asylum seekers. Does this imply that a longer duration would be necessary if the applicant were not an asylum seeker but, e.g., a foreign national illegally in the country? Or if the applicant is a convicted criminal?[95] Does a foreign national become more vulnerable once he decides to apply for asylum in a State party to the European Convention?

One may wonder if it is acceptable with respect to Article 3 of the Convention to distinguish between categories of persons, particularly if such distinctions are not based on the individual characteristics specific to the applicant but on general categorisations such as whether he requested asylum or not, or whether he has been convicted or not.

[94] Art. 15, § 1, of the Convention.

[95] In its judgment *Kalashnikov* v. *Russia* (15 July 2002), the length of the period of detention which in combination with a severely overcrowded and unsanitary environment amounted to degrading treatment of the prisoner was approximately 4 years and 10 months (§§ 101-102).

The living conditions of asylum seekers

M.S.S. was the first judgment in which the Court found the living conditions of asylum seekers to be contrary to Article 3 of the Convention. Within six months after that judgment, the Court arrived at the same conclusion in *Rahimi* and in *Sufi and Elmi*.

The case *M.S.S.* v. *Belgium and Greece*

As far as the living conditions of M.S.S. in Greece are concerned, the Court, while recalling that 'Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home', nor to 'entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living' (*M.S.S.* v. *Belgium and Greece*, GC, 21 January 2011, § 249), noted that the applicant alleged that he 'spent months living in a state of the most extreme poverty '…' and the ever-present fear of being attacked and robbed' (§ 254). Noting also that, according to observations from the Council of Europe Commissioner for Human Rights and the UN High Commissioner for Refugees (UNHCR), 'the situation described by the applicant exists on a large scale', the Court sees no reason to question the truth of the applicant's allegations (§ 255). Taking into account that the Greek authorities are bound to comply with their own legislation, which transposes the European Directive on the reception of asylum seekers[96] (§ 250), they have not had due regard to the applicant's vulnerability as an asylum seeker. Since, in addition, due to their inaction, they must be held responsible for the 'humiliating treatment' the applicant has been the victim of (§ 263), the Court considers, by 16 votes against 1,[97] that 'such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention' (§ 263). In doing so, the Court transforms this 'civil right by excellence' (the absolute prohibition of torture, or inhuman or degrading treatment or

[96] Council Directive 2003/9/EC of 27 Jan. 2003 laying down minimum standards for the reception of asylum seekers. In his partly dissention opinion, Judge Sajó finds that 'human rights as defined by the Convention differ from humanitarian concerns. '…' There is a difference '…' between EU law and conventional obligations which originate from the prohibition of inhuman and degrading treatment' (*M.S.S.*, p. 65).

[97] According to Judge Sajó's partly dissenting opinion, the position of the Court to 'admit the possibility of social welfare obligations of the State in the context of Article 3 of the Convention '…' would be perfectly compatible with the concept of the social welfare state and social rights, at least for a constitutional court adjudicating on the basis of a national constitution that has constitutionalised the social welfare state '…'. There seems to be only a small step between the Court's present position and that of a general and unconditional obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable"' (p. 64-65); *see also* n. 48 *supra*.

punishment) that must be respected regardless of the available resources, into a 'social right' requiring considerable expenditure which a Government has to put in balance with other legitimate requests to fulfil its obligations with respect to other social rights.[98]

The case *Rahimi* v. *Greece*

In *Rahimi* v. *Greece* (5 April 2011), the Court keeps in mind that, as far as the period subsequent to Mr Eivas Rahimi's release from the retention centre of Pagani was concerned,[99] due to his young age, the fact that he was a stranger in a situation of illegality in an unfamiliar country and that he was not accompanied, he belongs to the category of the most vulnerable persons of the society (§ 87). Taking note of reports of several organisations about the persistence of serious deficiencies in the practice of guardianship of unaccompanied minors in Greece (§ 89), the Court considers that, due principally to the indifference and the failure of the competent authorities with respect to the follow up of the applicant who was left to his own devices – his accommodation and care was ensured only by NGOs – the level of severity required by Article 3 of the Convention has been attained (§ 94). The Court does not state that the conditions of accommodation and care as ensured by NGOs in themselves violate Article 3 of the Convention, but that the accommodation and care were ensured, not by the Government, but by NGOs. If the agents of persecution may be 'persons or groups of persons who are not public officials',[100] why can the accommodation and care of asylum seekers not be ensured by NGOs?

The case *Sufi and Elmi* v. *the United Kingdom*

In order to hold the United Kingdom indirectly responsible for a violation of Article 3 of the Convention, if Mr Abdisamad Sufi and Mr Abdiaziz Elmi should upon their expulsion end up in an IDP settlement in the Afgooye Corridor or in the Dadaab refugee camps in Kenya, the Court referred in *Sufi and Elmi* v. *the United Kingdom* (28 June 2011, § 283) explicitly to its *M.S.S.* judgment (§ 254), which had regard to 'an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame'. The Court considered

[98] For more comments, *see* Bossuyt, *supra* n. 42, p. 591-593. Neither the world financial institutions, nor the European Union seem to be aware that the Court requires that Greece's budget should give priority to the accommodation of asylum seekers.

[99] Mr E. Rahimi was left to his own devices without shelter for two days when he was taken care of by a local organisation assisting migrants. With the help of that organisation, he was admitted four days later to a centre for minors in Athens (§§ 13-16).

[100] *See* n. 39 *supra*.

that the conditions in those settlements and camps are 'sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention' (§ 291).

This seems to be 'only a small step'[101] away from a future prohibition of the removal of any asylum seeker, or by extension any foreign national, to his country of origin if he is not sure to find in that country decent living conditions as understood by the Court. If, according to the Court, the absolute prohibition of Article 3 of the Convention applies henceforth to the living conditions of asylum seekers, at least in the EU Member States,[102] should the same standards not also apply to States parties to the Convention that are not EU Members and maybe also to States non-parties to the Convention if an asylum seeker is to be repatriated to such a country? The implications of such a step would be incalculable.

Making the exceptions envisaged in Article 5, § 1, (f), of the Convention almost impossible to apply

In three Belgian cases (*Muskhadzhiyeva and Others, Kanagaratnam and Others* and *Yoh-Ekale Mwanje)* and one French case (*Popov*), the threshold for inhuman treatment when asylum seekers are deprived of their liberty, is lowered to a level that makes in certain circumstances the exceptions[103] envisaged in Article 5, § 1, (f), of the Convention, almost impossible to apply.

The case *Muskhadzhiyeva and Others* v. *Belgium* (19 January 2010)

The first applicant in that case, Ms Aina Muskhadzhiyeva,[104] is a Russian citizen of Chechnyan origin, who was accompanied by her four young children (seven months, three-and-a-half years, five years and seven years old). It is obvious that she had tried to mislead[105] the Belgian authorities as to her stay, for probably more than a year and a half, in Poland. Because she had fled the open reception centre in which she was accommodated in Belgium while the authorities checked whether she had stayed in another EU member state, she was sent with her children, nearly two-and-a-half months after their arrival in Belgium, to a closed centre with a view to their transfer to Poland. Within two weeks, the Tribunal of first instance decided that their retention in a closed centre was necessary to ensure that transferral. One week later, their transfer had to be postponed because they refused to

[101] Cf. Judge Sajó's partly dissenting opinion to *M.S.S.* (*see* n. 97 *supra*).

[102] Cf. n. 97 *supra*. Is the prohibition of Art. 3 of the Convention more absolute in the States parties that are Member States of the European Union than in those that are not?

[103] 'No one shall be deprived of his liberty save in the following cases '…': the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person whom action is being taken with a view to deportation or extradition'.

[104] Ms A. Muskhadzhiyeva arrived, without any identity papers, on 11 Oct. 2006 in Belgium, because 'she had heard that the Belgian people are a good people'.

[105] Fingerprints taken on 1 Oct. 2004, 1 and 16 September 2005 and 24 May 2006 revealed that, at least on those dates, she had been in Poland.

leave for that country. Twelve days after it was taken, the decision of the Tribunal was confirmed by the Court of Appeal. The next day (on 24 January 2007), they embarked for Poland.

Contrary to *Mubilanzila Mayeke and Kaniki Mitunga* v. *Belgium* (12 October 2006),[106] the mother in *Muskhadzhiyeva and Others* was not separated from her children. However, this element was not sufficient, in the opinion of the Court, to exempt the authorities from their obligation to protect the children and to adopt adequate measures on the basis of the positive obligations which follow from Article 3 of the Convention (§ 58). Taking into account their young age, the length of their detention and their health situation, the Court considers that, as far as the children were concerned, the living conditions in the closed centre did attain the level of severity required by Article 3 of the Convention (§ 63). As far as the mother was concerned, the Court does not find a violation of Article 3 of the Convention, since – contrary to the *Mubilanzila Mayeke and Kaniki Mitunga* case – she had not been separated from her children whose constant presence could somewhat appease her feelings of helplessness so as not to attain the requisite threshold for being qualified as inhuman treatment (§ 66).[107]

The case *Kanagaratnam and Others* v. *Belgium* (13 December 2011)

Ms Renuka Kanagaratnam, a national of Sri Lanka converted in 2001 to Christianity, was accompanied by her three children (seven, ten and twelve years old) when, with the assistance of a smuggler, she arrived from Kinshasa (D. R. Congo) at the Belgian border on 23 January 2009 with a false Indian passport (§§ 7-10). On that basis, they were not admitted to enter Belgian territory and placed in a closed centre for illegal aliens near the airport. In the meanwhile, their asylum application was examined by the competent Belgian authorities.[108] Once their asylum application was concluded negatively, their departure for Kinshasa was scheduled for 20 March 2009 (§ 17). That same day, the Court indicated interim measures and the applicants refused to embark (§§ 18-19). On 23 March 2009,

[106] In that case, Tabitha, a 5-year-old child, was retained in a closed centre without her mother. The mother had abandoned that child (and her twin sister) in the D. R. Congo, when she left her country two years earlier for Canada. The separation of the child from her mother had caused, according to the Court, the child 'considerable distress' (§ 58) and her mother 'deep distress and anxiety' (§ 62). On that case, *see* Bossuyt (article), *supra* n. 1, p. 24-30.

[107] The Court holds that there has also been a violation of Art. 5, § 1, of the Convention, with respect to the children, because it considered that their detention was not lawful – despite the fact that they were accompanied by their mother – since they had been detained in a closed centre for illegal immigrants in the same conditions as adult persons, which consequently were not adapted to the state of extreme vulnerability in which they found themselves as foreign minors (§§ 73-74).

[108] The deprivation of their liberty, in order 'to prevent [theirs] effecting an unauthorised entry into the country' as provided for in Art. 5, § 1 (f), of the Convention (§ 78), was confirmed by the Tribunal of first instance on 20 Feb. and by the Court of Appeal on 5 March 2009.

they submitted a second asylum application and on 4 May 2009 the Aliens Office decided to let them enter Belgian territory in view of the examination of that second application (§§ 13 and 32).[109]

With respect to the children, the Court observed that the circumstances of the present case were comparable to those of *Muskhadzhiyeva and Others:* the children were accompanied by their mother and were kept in the same closed centre which the Court had already judged unfit for accommodating children (§§ 64-65). Neither the absence of medical certificates attesting psychological troubles, nor the somewhat older age of the children[110] was decisive in the eyes of the Court (§ 66): 'the best interest of the child', as enshrined in Article 3 of the Convention on the Rights of the Child, should prevail, even in a context of expulsion, (§ 67) with reference to its judgment *Nunez* v. *Norway* (28 June 2011).[111] For that reason, the Court concluded that the Belgian authorities have violated Article 3 of the Convention.

As the mother remained with her children, the Court, while recognizing that the powerlessness to put an end to the suffering of her children had exposed her to deep helplessness and anxiety, held that there was no violation of Article 3 of the Convention with respect to the mother (§§ 71-72), because it did not have sufficient elements to depart from its judgment in *Muskhadzhiyeva and Others.* The Court held, however, that there had been a violation of Article 5, § 1, of the Convention with respect to the three children[112] and to their mother[113] and that

[109] In the meanwhile, the deprivation of their liberty was again examined by the Tribunal of first instance on 27 March and 3 April 2009 and by the Court of Appeal on 21 April 2009 (§§ 27-30). On 2 Sept. 2009, they were recognized refugees by the Commissioner General for Refugees and Stateless Persons (§ 15). No reasons are given why the Commissioner General reversed his initial decision of 23 Feb. 2009.

[110] Nor the instruction given to the children during one hour and a half a day (§ 34).

[111] In that case, the Court concluded that the expulsion from Norway, with a two-year re-entry ban, of a mother, not an asylum seeker but illegally in the country, would violate Art. 8 of the Convention, because not 'sufficient weight was attached to the best interests of the children' (§§ 84-85). In their joint dissenting opinion, Judges Ljiljana Mijović (Bosnia and Herzegovina) and Vincent A. De Gaetano (Malta) considered, on the contrary, that a fair balance was struck between the right of the mother 'to respect for family life and the state's legitimate public interest in ensuring effective – and not merely cosmetic or illusory – immigration control' (§ 1). In their opinion, the best interest of the children is of primary importance, but is not necessarily decisive (§ 5). In *Antwi and Others* v. *Norway* (14 Feb. 2012), the Court hold, by five votes to two, that the expulsion from Norway, with a five-year re-entry ban, of a Ghanaian father of a daughter born in 2001 would not entail a violation of Art. 8 of the Convention.

[112] Because their detention took place in a centre considered inappropriate for accommodating them (§§ 86-88).

[113] While recognizing that the placement of the mother was decided 'in good faith' and 'in accordance with a procedure prescribed by law', the Court considers that, from the expiration of the initial period of two months until she was set free, there has also been a violation of the same

the respondent state is to pay to the mother EUR 7650 and to each of the three children EUR 13,000 (or a total of EUR 46,650) in respect of non-pecuniary damage.

The case *Yoh-Ekale Mwanje* v. *Belgium* (20 December 2011)
Ms Khaterine Yoh-Ekale Mwanje, a Cameroon national, arrived in 2002 in the Netherlands. After the rejection of her asylum application, she left that country in 2006 and started a relationship in Belgium with a Dutch national (§ 5). Bearing a false passport (§ 9), she was placed on 22 September 2009 in a closed centre for illegal aliens in view of her expulsion (§ 20). In the absence of a travel document, she was set free on 16 October and ordered to leave the territory (§ 22). Having obtained a new passport on 17 November (§ 13) but still staying illegally on Belgian territory, she was placed on 17 December 2009 in another closed centre (§ 24). Being informed that she would be repatriated the next day, she requested the Court take interim measures on 22 February 2010. They were granted the same day (§§ 33-34). She has been set free on 9 April 2010 (§ 37).[114]

During her first stay in a closed centre, the physician of the centre was informed by her lawyer (at the end of September 2009) that she was infected by HIV (§§ 38-39). The respondent Government asserts, however, that, when she was placed a second time in a closed centre (on 22 December 2009),[115] she had abandoned antiretroviral therapy since about a year (§ 95). The Court does not take this circumstance into consideration as the applicant had – two days before her second placement – been in consultation at the Institute of Tropical Medicine in Antwerp (§§ 41 and 95). Since she was only examined a first time at the initiative of the Aliens Office on 9 February 2010 and received only on 1 March 2010 the medicine prescribed on 26 February 2010, the Court, considering that the authorities had not acted with the required diligence, held that Article 3 of the Convention had been violated[116] (§§ 96-99) and that, for this lack of diligence, the respondent State is to pay her EUR 14,000 in respect of non-pecuniary damage.

provision with respect to the mother, as the centre was manifestly inappropriate to accommodate a family (§ 94).

[114] The deprivation of her liberty, 'taken with a view to deportation' as provided for in Art. 5, § 1 (f), of the Convention (§ 121), was confirmed by the Tribunal of first instance (three times), by the Court of Appeal (twice) and by the Court of Cassation (once).

[115] Six days later, she applied for a leave to stay on medical grounds. That application was rejected by the Aliens Office on 12 Jan. 2010 and confirmed by the Aliens Tribunal ('*Conseil du contentieux des étrangers*') on 19 April 2010 and by the *Conseil d'Etat* on 27 May 2010.

[116] Considering that a less severe measure than the maintenance in a closed centre should have been envisaged after it had indicated interim measures, the Court holds that Art. 5, § 1 (f), of the Convention has also been violated (§§ 124-125).

The case *Popov* v. *France* (19 January 2012)
Mr Vladimir Popov, a Russian speaking Kazakhstani national, arrived in France on 19 June 2003, preceded by his wife. Their asylum request was rejected on 20 January 2004 (§§ 8-9). On 27 August 2007, they were, accompanied by their two children aged 5 months and 3 years, placed in administrative retention in a hotel. After an unsuccessful attempt the next day to repatriate them to Kazakhstan, they were placed in an administrative retention centre. After yet another such attempt, they were released on 12 September 2007 (§§ 19-24).[117]

The applicants complained about overpopulation, dilapidation and lack of privacy (§ 94). Despite the absence of elements of evidence corroborating the allegations of the applicants,[118] the Court considered that even an administrative detention of 15 days, while not in itself excessive, could seem like a very long time for children living in an environment ill-suited to their age. The Court has no doubt that this situation has been for them a factor of anxiety, psychological perturbation and degradation of the parental image (§§ 100-101). With respect to the administrative retention of the children, the Court considered that their treatment exceeded the minimum level of severity required by Article 3 of the Convention (§ 103). On the contrary, referring to its judgments *Mubilanzila Mayeke and Kaniki Mitunga* and *Muskhadzhiyeva and Others,* the Courts holds, by 6 votes against 1,[119] that there has been no violation of that Article with respect to the administrative retention of the parents (§ 105).

The present author considers that in these four cases, the Court lowers the threshold for the prohibition of inhuman treatment to a level that makes Article 5, § 1, (f), of the Convention, allowing explicitly for deprivation of liberty in such cases, very difficult to apply. In view of the absolute character of that prohibition, the Court dispenses itself from striking a proper balance between the private interests of individual asylum seekers and the public interests of the society as a whole.

In *Muskhadzhiyeva and Others, Kanagaratnam and Others* and *Popov,* the retention in a closed centre was considered contrary to Article 3 of the Convention, with respect to the children, but not with respect to their mother or parents. The Court confronts the authorities with the following dilemma: either the children

[117] The Court did not examine their allegation of an (indirect) violation of Art. 3 of the Convention in the event of their expulsion to Kazakhstan since they had obtained refugee status on 16 July 2009 from the National Court of the Right of Asylum because an enquiry of the '*préfecture d'Angers*' with the Kazakhstani authorities could have put them in danger (§§ 27 and 74).

[118] The Court refers also to reports of the Council of Europe Commissioner on Human Rights and the European Committee for the Prevention of Torture (§ 96).

[119] In her partially dissenting opinion, Judge Ann Power-Forde (Ireland) considered that the confinement of the parents to a powerless role of spectators of the inhuman and degrading treatment of their children violated in itself Art. 3 of the Convention.

accompany their mother or their parents in the centre, as in those three cases, and the rights of the children are violated, or the children are separated from them, as in *Mubilanzila Mayeke and Kaniki Mitunga,* and the rights of the mother or the parents are violated (and maybe the rights of the children also). Particularly in *Muskhadzhiyeva and Others,* it was the mother who inflicted[120] on her children a deprivation of liberty by her refusal to abide by a decision lawfully taken. The Court nevertheless awarded the applicants EUR 17,000 for non-pecuniary damage. In *Saadi* v. *the United Kingdom* (GC, 29 January 2008),[121] the Court had recognized that the deprivation of liberty of asylum seekers is a 'necessary adjunct' to the undeniable sovereign right of States to control aliens' entry into and residence in their territory (§ 64). Up to now, the Court has not specified in which conditions children may be maintained in a closed centre or whether that 'undeniable sovereign right' becomes inapplicable once an asylum seeker is accompanied by his or her minor children.

One could argue that if Ms A. Muskhadzhiyeva had not tried to elude the legitimate decision of the Belgian authorities to transfer her with her children to Poland, a State party to the European Convention and to the Geneva Convention and an EU Member State, there would have been no deprivation of their liberty. Moreover, if she had not resisted the officers in charge of her transfer, their stay in a closed centre, which, as alleged by NGO medical personnel,[122] caused 'serious mental and psychosomatic symptoms' to her children, would have been considerably shortened.

Of course, it would be contrary to the absolute prohibition of Article 3 of the Convention to torture children in order to convince their mother to leave the country. But that was not at all the kind of treatment the children were subjected to. If the threshold for the applicability of Article 3 of the Convention is continuously lowered, is it possible to maintain the same absolute prohibition for conditions far below the threshold for torture, even if those conditions result from the refusal to respect a lawfully taken decision? Should that refusal be rewarded by allowing a person to remain in the country of his or her preference?

It could be argued that Ms R. Kanagaratnam and Ms K. Yoh-Ekale Mwanje could have put an end to the deprivation of their liberty (and that of Ms Kanagaratnam's children) at any time, by returning respectively to the D. R. Congo or to Cameroon as they were ordered to do. If they had not refused to embark on the scheduled flights, their deprivation of liberty would have lasted less than two

[120] By refusing to abide by the order to leave the country, the applicants in *Riad and Idiab* v. *Belgium* (24 Jan. 2008) had also self-inflicted their stay in the transit zone of the airport (*see* text between n. 87 and n. 88 *supra*).

[121] On *Saadi* v. *the United Kingdom*, *see* Bossuyt (article), *supra* n. 1, p. 30-33.

[122] Qualified 'independent doctors' by the Court (§§ 59-60).

months, instead of the three months and a half they are complaining about.[123] Maybe the conditions in the centre were not as inhuman as they pretend?

Is the extension of the duration of the deprivation of their liberty in those cases not also due to the interim measures taken by the Court? Those measures tend to prevent the expulsion of the applicants but they should not automatically result in their release from a closed centre. This should certainly not be the case when it implies giving access to the territory of the State concerned and, as a matter of fact, to the territory of all Schengen countries, without respecting the applicable national and European regulations. It is remarkable that interim measures, based only on the Rules of Procedure of the Court, tend to override other international treaty obligations binding upon the States concerned.

The effect of interim measures indicated by the Court in this field is often forcing States parties to the Convention to render their migration policy less effective. The interim measures result generally in having persons not entitled to have access to or to stay on the territory of the country concerned to do so anyway. While supposed to be 'provisional', their result is generally permanent (or should one say 'irreversible'). Indeed, even when in the end the measure is lifted, circumstances will have developed in the meanwhile to an extent that the decision blocked by the interim measure cannot be implemented anymore. By referring to 'the best interest of the child' – an open notion contained in a treaty other than the European Convention – the Court interprets 'primary consideration' as the only consideration which dispenses it from balancing between the interests of individuals with those of an 'effective – and not merely cosmetic or illusory – immigration control'.[124]

Opinions may diverge on the question whether the Belgian authorities did act with sufficient diligence as to the medical treatment of Ms. K. Yoh-Ekale Mwanje. In any case, the 'lack of due diligence' attributed to the Belgian authorities was a matter of weeks, while the lack of diligence attributable to the applicant herself, who for about a year was not under therapy[125] before she was placed in a closed centre, was a matter of months. It is even more worrisome when the indication of interim measures taken by a single judge (albeit the president or acting president of a Chamber or a Section) is apparently designed to reverse a Grand Chamber judgment (*N.* v. *the United Kingdom*, GC, 27 May 2008). In that judgment

[123] In its judgment *Popov* v. *France*, the level of severity required by Art. 3 of the Convention is lowered to two weeks, despite the fact that the children were accompanied by their parents and their freedom of movement, at the age of 3 years and certainly at the age of 5 months, is even at home quite limited.

[124] Cf. n. 111 *supra*.

[125] For that reason, it was, according to the Belgian Secretary of State for Asylum, necessary to take time to carry out tests which revealed that her initial medication had to be changed because she had become resistant to it (Parl. Doc, Senate, *Annales*, 5-135 COM, p. 6-7, 13 March 2012).

(§ 42), the majority of the Grand Chamber hold that only '*in very exceptional circumstances*'

> [t]he decision to remove an alien who is suffering from serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3.

It is surprising to note that interim measures have been indicated in precisely such cases. The case of *Yoh-Ekale Mwanje* is such an example, but there are others.[126] In view of the common partially concurring opinion of six[127] of the seven judges of the Chamber in *Yoh-Ekale Mwanje* expressing the hope that the Court might one day review its case-law on this issue, that desire has even been made explicit. Apparently, those judges are not impressed by the huge financial consequences of such a review, multiplied by the attraction it would exercise upon persons living in countries where the health care system is less developed than in most States parties to the Convention.[128]

Concluding observations

The asylum cases have a large number of characteristics that distinguish them from other cases. Those specific characteristics are the result of the fact that the principal right at issue, enshrined in Article 3 of the Convention, unlike most articles of the Convention is not subject to a restriction clause, but is an *absolute* prohibition which does not allow for any restriction, any exception, nor any derogation, not even 'in time of war or other public emergency threatening the life of the nation'.

The absolute character of the prohibition is invoked to justify the findings of indirect and potential violations:

– *indirect* because the States parties are held responsible for treatment inflicted by non-States parties;[129]

[126] Besides *Yoh-Ekale Mwanje,* A. Gillet ('L'extension matérielle du champ des mesures provisoires', in Krenc, *supra* n. 59, p. 112, n. 19) mentions *Josef* v. *Belgium* (No. 10055/10): an HIV infected Nigerian woman; *Diallo* v. *Luxembourg* (No. 55642/10): an HIV infected Guinean man; *Isa Faidal* v. *Finland* (No. 36354/10): an Egyptian woman suffering cancer; *Tamara Suzi* v. *Finland* (No. 66697/10): a sick Russian woman.

[127] *See* n. 34 *supra*.

[128] In *N.* v. *the United Kingdo*m (§ 44), the Court, by 14 votes to 3, considered very rightly that a finding that Art. 3 would place an obligation on the contracting State to provide 'free and unlimited health care to all aliens without a right to stay within its jurisdiction '…' would place too great a burden on the Contracting States'; *see also* Bossuyt (article), *supra* n. 1, p. 39-43.

[129] The first case was *Amekrane* v. *the United Kingdom* (Com., 11 Oct. 1973).

– *potential* because very often the prohibited treatment has not taken place, but could take place if a person has to leave the territory of a State party.[130]

As a consequence,

– the Court does not assess facts that did happen but *speculates* about events that could happen;[131]
– the Court must be familiar not only with situations and regulations of States parties to the Convention but also of *States non-parties* to it;
– the Court does not only rely on primary sources but also relies heavily on *secondary sources*.[132]

New developments in the case-law of the Court, combined with those characteristics, increase the complexity[133] and the number of asylum applications addressed to the Court:

– the continuous *lowering of the threshold* of Article 3 of the Convention: starting from the prohibition of torture and inhuman or degrading punishment or treatment, the Court condemns a wide variety of forms of ill-treatment with a lower threshold, especially when the applicant is an asylum seeker;[134]
– the transformation of Article 3 of the Convention from a civil right that must and can be respected regardless of the available resources into a *social right*, such as the obligation to ensure decent living conditions for particular categories of persons, which requires considerable expenditures by the State;[135]
– the recognition of '*vulnerable population groups* in need of special protection', such as Roma[136] and mentally disabled persons[137] and now even a self-elected category such as asylum seekers;[138]
– the decision of the Court to declare *binding* the *interim measures* it indicates, results, as was to be expected, in a tremendous increase in the number of those applications.[139]

[130] The first case was *Soering* v. *the United Kingdom* (Pl. Crt, 7 July 1989, § 90).

[131] *See* the separate opinion of Judge Zupančič attached to *Saadi* v. *Italy* (GC, 28 Feb. 2008).

[132] *See* n. 65 *supra*.

[133] The lower the threshold and the wider the scope of the prohibition of Art. 3 of the Convention, the more difficult it becomes to maintain its absolute character.

[134] *See* text between n. 89 and n. 96 *supra*; on the 'trivialisation' of Art. 3 of the Convention, *see also*, Bossuyt, *supra* n. 42, p. 589-591, and, more generally, S. Dewulf, *The Signature of Evil: (Re) Defining Torture in International Law* (Intersentia 2011), 647 p.

[135] Bossuyt, *supra* n. 42, p. 591-593.

[136] *Oršuš and Others* v. *Croatia* (GC, 16 March 2010, § 147).

[137] *Alajos Kiss* v. *Hungary* (20 May 2010, § 42).

[138] *M.S.S.* v. *Belgium and Greece* (GC, 21 Jan. 2011, §§ 251).

[139] Since *Mamatkulov and Askarov* v. *Turkey* (GC, 4 Feb. 2005), the number of requests for interim measures increased from 122 in 2006 to 883 in 2007, 2,871 in 2008, 2,638 in 2009 and

More than in any other field, the Court exercises in asylum cases a multitude of functions:[140]

- appeals court[141] when substituting its own assessment of the facts and its own speculations of future events for those of the competent authorities;
- cassation court when reviewing whether the national authorities have correctly applied their national regulations;[142]
- international court when deciding that national law provisions violate the Convention;
- summary proceedings court when indicating binding interim measures under its Rule 39.

Asylum cases, and to a lesser extent applications by foreign nationals not having applied for asylum but to be extradited or expelled, represent the overwhelming majority of the interim measures indicated by the Court.[143] In that capacity, it always acts without giving the opportunity to the respondent Government to let its views be known. In whatever capacity the Court deals with asylum cases, it never[144] hears or sees the asylum seeker, an indispensable requisite though when an appeals body wishes to substitute its assessment of the asylum seeker's credibility for that of the national authorities. Particularly in fact-intensive cases, the Court lacks moreover the flexibility to respond promptly to the volatility of factual situations.[145]

4,786 in 2010 (according to an annex to the declaration of the President of the Court dated 11 Feb. 2011). According to statistics published by the Court on its website, the total of Rule 39 requests was 3,185 in 2008, 2,402 in 2009, *3,775* in 2010 and 2,778 in 2011 (no explanation is given for the different figures provided by the Court). On a total of 9,242 for 2008-2010, the number of requests granted was 2,842 (30%), a huge percentage compared with the approximately 5% of applications declared admissible globally. However, the percentage of requests granted did drop from 38% in 2010 to 12% in 2011.

[140] Bossuyt (article), *supra* n. 1, p. 47.

[141] In asylum cases, it even happens that the Court acts as first instance. What exactly is the Court doing when it is considered appropriate to provide a card attesting the membership of a political party, a letter of threats, a medical certificate attesting the presence of scars, a summons by a police or judicial authority, a search warrant, testimonies, an identity document attesting that someone belongs to a minority, photos, etc.? *See* Cl. Dubois-Hamdi, 'Le régime procédural des mesures provisoires', in Krenc, *supra* n. 61, p. 39.

[142] Particularly when examining the requirements of Art. 5, § 1 ('prescribed by law'), and § 4 ('lawful'), of the Convention.

[143] *See* Council of Europe, *Annual Report 2008 of the European Court of Human Rights*, at p. 4: Interim measures are taken 'mostly in sensitive cases concerning the rights of aliens and the right of asylum'.

[144] With one – rather unconvincing – exception: *N.* v. *Finland* (26 July 2005); *see* Bossuyt (article), *supra* n. 1, p. 22-24.

[145] In *Sufi and Elmi* v. *the United Kingdom*, the essential fact (the general violence in Al-Shabaab controlled Mogadishu) on which the judgment, which took more than four years (21 Feb. 2007-

Finally, should the Court of Strasbourg become the European Asylum Court? It is important to be aware of the fact that the combination of characteristics that distinguish the asylum cases before the Court from other cases it has to deal with, makes it very difficult to handle those cases. For that reason also, it would be advisable to organise the sections of the Court not on the basis of a number of respondent States but rather on that of the countries of destination of the individuals to be removed.

In view of the many different characteristics specific to asylum cases and the decision of the Court to give priority to those cases,[146] and taking into account its huge backlog,[147] it might be worthwhile to examine whether it would not be preferable that the States parties should amend the Convention in order to transfer this kind of cases from the Court to a separate European Asylum Court. In the framework of an overall reshuffling of the European human rights system, the cases concerning social rights such as those concerning special allowances for handicapped persons[148] and pensions,[149] including cases concerning decent living conditions of 'vulnerable population groups in need of special protection',[150] could be transferred from the Court to a new European Social Court that could also supervise the implementation of the provisions of the European Social Charter.[151]

In order to put an end to discussions[152] about the Court disregarding the intentions of the States parties and extending the limits of its jurisdiction without

28 June 2011), was based, changed dramatically and positively within six weeks (6 Aug. 2011) after it was rendered.

[146] In June 2009, the Court decided no longer to adjudicate anymore the cases on a chronological basis but to have regard to the importance and urgency of the issues raised. Of the seven categories drawn up by the Court, category I consists of urgent applications involving in particular risks to the life or health of the applicant and category III consists of applications raising as main complaints issues under Arts. 2, 3, 4 or 5, § 1, of the Convention ('core rights').

[147] On 1 Jan. 2009 there were 97,300 pending applications, on 1 Jan. 2010 119,300, on 1 Jan. 2011 139,650, on 31 Aug. 2011 160,200 and on 1 Jan. 2012 151,600.

[148] *Koua Poirrez* v. *France* (30 Sept. 2003).

[149] *Stec and Others* v. *the United Kingdom* (GC, admissibility, 6 July 2005, and merits, 12 April 2006, § 52) and *Andrejeva* v. *Latvia* (GC, 18 Feb. 2009, § 89). In those judgments, the Court itself admits that the states parties enjoy in this field a 'wide' or a 'broad' margin of appreciation (M. Bossuyt, 'L'extension de la compétence de la Cour de Strasbourg aux prestations sociales', 10 *Revue de Droit Monégasque* (2009-2010) p. 91, at p. 125).

[150] *See* n. 46 *supra*.

[151] M. Bossuyt, 'Should the Strasbourg Court exercise more self-restraint?', 28(9-12) *Human Rights Law Journal* (2007) p. 321, at p. 327.

[152] *See* the very relevant questions formulated by Judge Françoise Tulkens (Belgium), now Vice-President of the Court ('The European Convention on Human Rights between International Law and Constitutional Law', in European Court of Human Rights, *Dialogue between Judges 2007*, Strasbourg, p. 14-15, and Background paper to the Seminar 'What are the limits to the evolutive interpretation of the Convention?', *Dialogue between Judges 2011*, Strasbourg, 28 Jan. 2011, § 19): 'Can international treaties be interpreted in such a way as to impose more obligations on States

democratic legitimacy,[153] it could be stipulated that the two new courts should exercise their jurisdiction only with respect to those States parties that will explicitly recognize it, possibly for a fixed period of time. And what about the present Court? It could perhaps reflect on the wisdom of the carpenter Jack in the fairy tale written by Egbert Myer and Peter Kempees, who suggested a course of action by asking most innocently 'What if the Permanent Court did only what it was set up to do?'[154] Many thousands of applications have been and will continue to be submitted and they deserve to be dealt with 'within a reasonable time'.[155]

than they are prepared to accept? More specifically, to what extent does the sovereignty principle admit of an interpretation that goes beyond the original intention of the treaty and modifies the substance of the obligations to which the States initially committed themselves?' *See also* Baroness Hale of Richmond, 'Common Law and Convention Law: The Limits to Interpretation', 5 *European Human Rights Law Review* (2011) p. 534-543.

[153] Bossuyt, *supra* n. 151, p. 330.

[154] Myjer, E. and Kempees, P., *Jack and the Solemn Promise – A Cautionary Tale* (Wolf Legal Publishers 2010), 36 p., at p. 31.

[155] Art. 6, § 1, of the Convention.