

Facilitating (Further) Inhumanity

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DOI:

[10.1163/26663236-bja10081](https://doi.org/10.1163/26663236-bja10081)

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Document Version

Publisher's PDF, also known as Version of record

Citation for published version (Harvard):

Mavronicola, N 2024, 'Facilitating (Further) Inhumanity: On the Prospect of Losing Article 3 ECHR, a Vital Guarantee for the Under-Protected', *European Convention on Human Rights Law Review*, pp. 1-19.
<https://doi.org/10.1163/26663236-bja10081>

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Commentary



Facilitating (Further) Inhumanity: On the Prospect of Losing Article 3 ECHR, a Vital Guarantee for the Under-Protected

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Received 22 June 2023 | Accepted 2 February 2024 |
Published online 19 February 2024

Abstract

Article 3 of the ECHR encompasses an absolute right not to be subjected to torture or to inhuman or degrading treatment or punishment. This right proscribes, and demands protection from, treatment which is antithetical to human dignity. Over the years, what amounts to such treatment – and the obligations flowing therefrom – has been the subject of extensive interpretation by the ECtHR and domestic courts. Applicable in many contexts beyond the conventional scenario of interrogational torture, the right's significance – and much of the backlash it has attracted – lies chiefly in the protections it demands for persons who fall through the cracks of the political process. This comment contemplates what is at stake, in terms of Article 3's protections, in a potential UK departure from the ECHR, and concludes that a loss of the protection offered under Article 3 ECHR would facilitate (further) inhumanity, particularly against persons who are already othered, under-protected, and victimised.

Keywords

Article 3 ECHR – torture – inhuman or degrading treatment – *refoulement* – positive obligations – common law constitutional rights

1 Introduction

Article 3 of the European Convention on Human Rights (ECHR) provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Both the European Court of Human Rights (ECtHR or Court) and United Kingdom (UK) courts have repeatedly underlined that the right enshrined in Article 3 is absolute. This means that the right's demands cannot be displaced by extraneous considerations¹ – it does not allow for lawful interference like the rights to privacy or freedom of expression, for example, do,² nor can it be derogated from in times of war or other public emergency threatening the life of the nation.³ Conduct contrary to Article 3 ECHR is conclusively unlawful, regardless of concerns relating to 'legitimate aims' such as national security, or indeed of the (prospective) unpopularity of a finding of violation, often tied to the unpopularity of a particular judgment's (perceived) beneficiaries. As the ECtHR has repeatedly underlined, Article 3's protection is unconditional and applies 'irrespective of the conduct of the person concerned'.⁴

The ECtHR tends to determine whether Article 3 has been violated with reference to what it calls a 'minimum level of severity': it has frequently reiterated that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.⁵ According to the ECtHR, the question of whether that 'minimum level of severity' has been reached must be answered through an assessment that 'is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of

1 See N Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) *Human Rights Law Review* 723.

2 See, for example, Articles 8(2), 9(2), 10(2), and 11(2) ECHR.

3 Article 15(2) ECHR provides: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(1) and 7 shall be made under this provision'.

4 *Chahal v the United Kingdom* [GC] 22414/93 (ECtHR, 15 November 1996) para 87.

5 *Ireland v the United Kingdom* [Plenary Court] 5310/71 (ECtHR, 18 January 1978) para 162.

the victim, etc'.⁶ The Court often pays close attention to the vulnerability of the person subjected to the relevant treatment in determining whether they have been ill-treated.⁷ The Court's assessment is therefore 'relative' in the sense that it *relates to* a number of relevant (contextual) variables, such as potentially intersecting factors shaping the individual's particular vulnerability or the perpetrator's knowledge, attitude and/or intent.⁸

At its heart, Article 3 proscribes, and demands protection from, treatment which is antithetical to human dignity.⁹ Over the years, the ECtHR has built a rich body of Article 3 jurisprudence in which the right's demands have been specified as giving rise to a variety of obligations upon state authorities.¹⁰ In turn, UK courts have referred extensively to Article 3 ECHR following the enactment of the Human Rights Act 1998 (HRA), building a growing body of case law in which Article 3 ECHR has played a key role.¹¹ The right has been found applicable in contexts well beyond the conventionally invoked scenario of interrogational torture – contexts such as police brutality,¹² domestic violence,¹³ child abuse and child neglect,¹⁴ and subjection to degrading living conditions.¹⁵

Article 3 imposes not only negative obligations on state authorities to refrain from ill-treatment, but also positive obligations to protect people from torture, inhumanity and degradation. Positive obligations under Article 3 include general, or framework, obligations, which require the state to establish and maintain laws and implementation mechanisms that adequately protect

6 Ibid. See also, for example, *Svinarenko and Slyadnev v Russia* [GC] 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 114.

7 The role of vulnerability in the ECtHR's Article 3 jurisprudence is thoroughly analysed in C Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Hart Publishing 2021).

8 See N Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing 2021) Chapters 4 and 5.

9 E Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2017).

10 These are discussed extensively in the ECtHR, 'Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture' (31 August 2022): <https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG>. See also the following recent monographs: Heri (n 7); Mavronicola (n 8); Webster (n 9).

11 M Amos, *Human Rights Law* (Hart Publishing 2021) Chapter 8.

12 See, for example, *Muradova v Azerbaijan* 22684/05 (ECtHR, 2 April 2009); *Güler and Öngel v Turkey* 29612/05 and 30668/05 (ECtHR, 4 October 2011).

13 See, for example, *Opuz v Turkey* 3340/02 (ECtHR, 9 June 2010); *Volodina v Russia* 41261/17 (ECtHR, 9 July 2019); *AE v Bulgaria* 53891/20 (ECtHR, 23 May 2023).

14 See, for example, *O'Keefe v Ireland* [GC] 35810/09 (ECtHR, 28 January 2014); *Z and Others v the United Kingdom* [GC] 29392/95 (ECtHR, 19 May 2001).

15 See, for example, *MSS v Belgium and Greece* [GC] 3069/09 (ECtHR, 21 January 2011).

people from torture, inhumanity and degradation.¹⁶ State authorities are also under a duty to take operational measures to protect someone at risk of torture or inhuman or degrading treatment, insofar as the authorities know or ought to know of a real and immediate risk to this person.¹⁷ There are also extensive and robust requirements of investigation and redress imposed under what is often referred to as the ‘procedural’ positive obligation to investigate suspected torture or ill-treatment.¹⁸ All of these positive duties, which are interlinked, entail that states are required not only to put in place appropriate legal frameworks to protect persons from ill-treatment such as domestic violence, rape, and sexual assault, but also to implement such laws rigorously and effectively.

In the following sections, I will attempt to elucidate what is at stake, in terms of Article 3’s protections, in a potential UK departure from the ECHR by reflecting, first, on the continuum of torture and dehumanisation in or involving the UK; second, on an illustration of the ways in which and contexts in which Article 3’s protections have been vital; and third, on the mythology and reality of the UK constitution’s equivalent guarantees. I conclude that a departure from the ECHR, and thereby a loss of the protection offered under Article 3 ECHR, would facilitate (further) inhumanity, particularly against persons who are already othered, under-protected, and victimised.

2 An Uninterrupted History of Torture and a Continuum of Dehumanisation and Abuse

In 1971, UK Government agents subjected a number of people they suspected of involvement in the activities of the Irish Republican Army to the so-called ‘five techniques’ of interrogation, which included painful stress positions, hooding, noise, deprivation of sleep, and deprivation of food and drink. The survivors of these ‘techniques’ came to be known as the Hooded Men.¹⁹ The European Commission of Human Rights (Commission) found the ‘techniques’ to constitute torture,²⁰ while the ECtHR considered that they amounted

16 See, for example, *Volodina* (n 13) paras 78–85.

17 *Ibid* paras 86–91.

18 *Ibid* paras 92–101.

19 See the detailed accounts in K Cavanaugh, ‘On Torture: The Case of the “Hooded Men”’ (2020) 42 *Human Rights Quarterly* 519; A Duffy, *Torture and Human Rights in Northern Ireland: Interrogation in Depth* (Routledge 2019).

20 *Ireland v the United Kingdom* 5310/71 (ECmHR, report, 25 January 1976).

to inhuman and degrading treatment.²¹ In 2021, the UK Supreme Court acknowledged that '[it] is likely that the deplorable treatment to which the Hooded Men were subjected at the hands of the security forces would be characterised today, applying the standards of 2021, as torture'.²² The Hooded Men have since received an apology from the Police Service of Northern Ireland (PSNI).²³

The *Ireland v UK* findings meant that the UK was in violation of Article 3 ECHR. Following the Commission's findings in the case, the UK claimed to have abandoned the 'five techniques' and on 8 February 1977 the UK Attorney-General issued an 'unqualified undertaking, that the "five techniques" will not in any circumstances be reintroduced as an aid to interrogation'.²⁴

Many years after the ECtHR's 1978 judgment in *Ireland v UK*, an inquiry into the death in 2003 of Baha Mousa, a hotel receptionist in Iraq, found that British soldiers had subjected him to the same, by now supposedly banned, 'techniques' as well as other forms of inhuman treatment.²⁵ Over the course of the past two decades, it has been firmly established that the 'five techniques' have in fact evolved and migrated, being used around the world, too often with the complicity of UK forces.²⁶ It has also become clear that the development and evolution of such 'techniques', from Kenya and Cyprus to Iraq and beyond, has been part of the UK's uninterrupted history of (involvement in) torture.²⁷

21 *Ireland* (n 5).

22 *In the Matter of an Application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the Matter of an Application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the Matter of an Application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2)* [2021] UKSC 55, [2022] AC 1063, [186].

23 F McClements, "Hooded Men" Receive Apology From PSNI, 52 Years After Interrogation Torture' (The Irish Times, 13 June 2023): <<https://www.irishtimes.com/crime-law/2023/06/13/hooded-men-receive-apology-from-psni-52-years-after-interrogation-torture/>>.

24 This is cited in *Ireland* (n 5) para 153.

25 Baha Mousa Inquiry, *The Report of the Baha Mousa Inquiry*, vol I (8 September 2011, HC 1452-1): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf>.

26 Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001–2010* (28 June 2018, HC 1113): <<https://isc.independent.gov.uk/wp-content/uploads/2021/01/20180628-HC1113-Report-Detainee-Mistreatment-and-Rendition-2001-10.pdf>>.

27 See I Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books 2012). On the more recent history and the 'future-proofing' of UK (involvement in) torture, see R Blakeley and S Raphael, 'Accountability, Denial and the Future-Proofing of British Torture' (2020) 96(3) *International Affairs* 691. See also R Blakeley and S Raphael, 'The Prohibition Against Torture: Why the UK Government is Falling Short and the Risks that Remain' (2019) 90(3) *The Political Quarterly* 408.

Turning our eyes to the present, it is important to underline that torture is not aberrant, but pervasive.²⁸ As Malcolm Evans has observed, '[m]ost torture is the result of routine barbarity in systems which just cannot be bothered to address it'.²⁹ The 'banality' of such 'barbarity' has much to do with the positioning of its 'typical' victims on the margins of society's or public institutions' regard. Victims of torture and ill-treatment tend to be subject to vulnerability, marginalisation, and indeed dehumanisation not only during, but also prior and leading to, such ill-treatment.³⁰

In a scathing review published in March 2023, the London Metropolitan Police has been exposed as being institutionally racist, misogynist, and homophobic in character, notably in inflicting, or responding to, violence.³¹ In making this finding, Louise Casey underlined and condemned a tendency to seek to isolate abusive behaviour by casting perpetrators as a few 'bad apples',³² and demanded a 'complete overhaul'³³ of the Met's culture and structures. Casey highlighted the over-policing and under-protection of Black people, who were routinely exposed to more (abusive) uses of force and intimate searches, for example, while being under-protected from violent crime.³⁴ Also often profoundly under-protected are women, children, and LGBTQ+ persons, and people facing intersections of discrimination and disadvantage.³⁵ Decades after the Macpherson Report's finding of institutional racism and acknowledgement of the over-policing and under-protection of Black people by the Met in the context of the Stephen Lawrence Inquiry,³⁶ the Casey Review

28 See United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (20 July 2018) A/73/207, para 18; N Mavronicola, 'Torture and Othering', in *Security and Human Rights*, B Goold and L Lazarus (eds), (2nd edn, Hart Publishing 2019).

29 MD Evans, 'Publication Review: The Prohibition of Torture in Exceptional Circumstances – Michelle Farrell' (2014) 63 *International and Comparative Law Quarterly* 507, 508.

30 See N Rodley, *The Treatment of Prisoners Under International Law* (Oxford University Press 1999) 14–15; Mavronicola (n 28).

31 B Casey, *Final Report: An Independent Review into the Standards of Behaviour and Internal Culture of the Metropolitan Police Service* (March 2023): <<https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>> especially Chapter 9.

32 Ibid 7, 14, 30, 34, and 272.

33 Ibid 19.

34 Ibid 312–328.

35 Ibid Chapter 9 and throughout.

36 The phrase 'over-policed and under-protected' was employed by David Muir, a representative of senior Black Church Leaders, quoted in Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (CM 4262-1, 1999).

shines a light on a continuum of dehumanisation, violence, and disregard that is endemic, rather than alien, to the UK.

Acknowledging this historical continuum and pervasive character of abusive and dehumanising practices and attitudes is crucial lest we become complacent regarding the need for robust protections against torture and inhuman and degrading treatment and punishment, as well as other relevant rights guarantees. As will be argued below, it is also vital in countering mythological proclamations of the UK constitution's potential for supplying the relevant protections in the event of a UK departure from the ECHR.

3 The Significance of the Absolute Right Enshrined in Article 3 ECHR: An Illustrative Account

A key facet of Article 3 ECHR, and one that illuminates the significance of its absolute character, was built and bolstered in cases involving the UK. In the 1980s, the UK sought to transfer Jens Soering to the authorities in Virginia in the United States, where Soering faced prosecution for murdering his girlfriend's parents and, if convicted, the death penalty. In the 1989 case of *Soering v UK*, the ECtHR found that extraditing Jens Soering to the United States would violate Article 3 ECHR, because the experience of being on death row would cause so much anguish and suffering as to be inhuman.³⁷ *Soering* formed the starting point in establishing that Article 3 ECHR encompasses a *non-refoulement* duty: that is, an obligation not to expel – whether by deportation, extradition, pushback, or otherwise – individuals to places where they face a real risk of torture or inhuman or degrading treatment or punishment.³⁸

In the 1990s, the UK proposed to deport Karamjit Singh Chahal and his wife to India because they considered Mr Chahal to pose a threat to national security. In its 1996 judgment in *Chahal v UK*,³⁹ the ECtHR confirmed that Article 3 ECHR prohibits removing someone to another state where substantial grounds have been shown for believing that they would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. The ECtHR underlined that the prohibition on doing so is absolute, and the activities of the individual in question, however 'undesirable

37 *Soering v the United Kingdom* [Plenary Court] 14038/88 (ECtHR, 7 July 1989) paras 81–111.

38 I unpack this obligation in Mavronicola (n 8) Chapter 7. See further F de Weck, *Non-Refoulement Under the European Convention on Human Rights and the UN Convention Against Torture* (Brill 2016).

39 *Chahal* (n 4).

or dangerous',⁴⁰ cannot displace the protection of Article 3. The ECtHR found that Mr Chahal faced a real risk of ill-treatment at the hands of Indian security forces and put a stop to his deportation.⁴¹

In the subsequent case of *Saadi v Italy*,⁴² which concerned the proposed deportation to Tunisia of a man suspected of involvement in 'terrorist' activity, the UK as an intervening party argued for a distinction to be made between treatment inflicted by a contracting state's authorities and treatment inflicted by a non-contracting state's authorities outside of a contracting state's jurisdiction, suggesting the latter should be assessed through a balancing of interests. The Grand Chamber dismissed the UK Government's arguments, confirming a clarification made in *Chahal*⁴³ that 'it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a state is engaged under art.3' and that accordingly 'the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account' for such purposes.⁴⁴ In a concurring opinion, Judge Zupančič suggested that a concession to the UK government's argument could only take place by maintaining that 'such individuals [as the applicant in *Saadi*] do not deserve human rights – the third-party intervener is unconsciously implying just that to a lesser degree – because they are less human'.⁴⁵

The *non-refoulement* duty has now been firmly cemented as a fundamental component of the right protected under Article 3 ECHR. Where 'substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country',⁴⁶ removal would conclusively violate the Convention. The *non-refoulement* duty under Article 3 encompasses protection from being removed to face a real risk of violence, whether it is at the hands of state or non-state actors,⁴⁷ a real risk of being subjected to the death penalty⁴⁸ or to

40 Ibid para 80.

41 Ibid para 107.

42 *Saadi v Italy* [GC] 37201/06 (ECtHR, 28 February 2008).

43 *Chahal* (n 4) para 81.

44 *Saadi* (n 42) para 138.

45 Ibid Concurring Opinion of Judge Zupančič.

46 *Chahal* (n 4) para 74.

47 *HLR v France* [GC] 24573/94 (ECtHR, 29 April 1997) para 40.

48 *Al Saadoon and Mufdhi v the United Kingdom* 61498/08 (ECtHR, 2 March 2010).

whole life imprisonment without parole,⁴⁹ a real risk of inhuman or degrading detention and living conditions,⁵⁰ a real risk of *refoulement* (that is, of being further removed to face a real risk of ill-treatment),⁵¹ as well as where the risk the person faces on removal is of ‘a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy’.⁵² Article 3-incompatible expulsion can involve actual *or* constructive knowledge of (or indifference towards ascertaining) the real risk of ill-treatment. The case law establishes that ‘no questions asked’ practices of expulsion – whether they amount to mass or indiscriminate expulsion or summary processes – do the opposite of absolving states of the wrong of *refoulement*.⁵³ Rather, the ECtHR requires there to be a process involving a ‘thorough and individualised examination of the situation of the person concerned’.⁵⁴

Article 3 ECHR is therefore an important barrier to a variety of anti-immigration measures and to extraditions that expose persons to a real risk of irreparable harm. Article 3’s *non-refoulement* component has, for this reason, been a target of consecutive UK governments, which have sought to displace or dilute Article 3’s protection in order to facilitate restrictive immigration policies and expedited removal processes, and to deport or extradite particular (often deemed dangerous or otherwise undesirable) individuals. As early as 2006, Tony Blair indicated that he would like to change human rights protections in the UK specifically to alleviate the ban on expelling ‘undesirable’ people from the UK to places where they face a real risk of torture or other ill-treatment. His aim was, purportedly, to ‘ensure the law-abiding majority can live without fear again’.⁵⁵ The Conservatives’ more recent attacks have included proposals to dilute the *non-refoulement* duty by defining the substantive scope of Article

49 *Trabelsi v Belgium* 140/10 (ECtHR, 4 September 2014). However, see the criticism levied at the recent judgment in *Sanchez-Sanchez v the United Kingdom* [GC] 22854/20 (ECtHR, 3 November 2022) – P Arnell, ‘Extradition and the Regrettable Influence of Politics Upon Law: The European Court of Human Right’s Decision in *Sanchez-Sanchez v UK*’ (Verfassungsblog, 17 November 2022): <<https://verfassungsblog.de/extradition-and-the-regrettable-influence-of-politics-upon-law/>>.

50 See, notably, *MSS* (n 15).

51 *Ibid.*

52 *Paposhvili v Belgium* [GC] 41738/10 (ECtHR, 13 December 2016) para 183.

53 See, notably, *MA v Lithuania* 59793/17 (ECtHR, 11 December 2018) paras 103, 113–15; *Amerkhanov v Turkey* 16026/12 (ECtHR, 5 June 2018) paras 57–58. Note also Article 4 of Protocol 4 to the ECHR.

54 *Tarakhel v Switzerland* [GC] 29217/12 (ECtHR, 4 November 2014) para 104.

55 See, for example, BBC News, ‘Blair “to Amend Human Rights Law”’ (14 May 2006): <<http://news.bbc.co.uk/1/hi/uk/4770231.stm>>.

3 ECHR more narrowly⁵⁶ and attempts to restrict procedural protections in respect of *refoulement*.⁵⁷ The Article 3 ramifications of the UK Government's policy of 'relocating' persons seeking asylum to Rwanda are currently being litigated,⁵⁸ while the Government's Illegal Migration Act openly takes aim at the Article 3 *non-refoulement* duty and will very likely, if implemented, violate Article 3 ECHR.⁵⁹ This is likely, in turn, to escalate tensions in the UK's relationship with the ECtHR and Council of Europe more broadly.

While the *non-refoulement* duty constitutes a powerful illustration of the significance of Article 3's non-displaceable guarantees, there is a wealth of other contexts in which Article 3 has been a vital source of protection. Article 3's positive obligations are built on a vast domain of pronouncements demonstrative of its (enhancement of) protections for the heretofore under-protected. States' positive obligations under Article 3 to legislate and implement an appropriately protective framework, to intervene in cases of a specific risk, and to investigate and redress alleged or suspected abuse, have largely been fleshed out in contexts where people are rendered particularly vulnerable to abuse, including through socio-political structures that exclude or disempower them⁶⁰ – consider, for example, children facing abuse and neglect, women subjected to gender-based violence, or LGBTQ+ persons or racial or religious minorities subjected to brutal attacks.⁶¹ The Court has also increasingly recognised circumstances where state authorities have failed in discharging their positive obligations because of institutional, systemic,

56 Z Darling, 'Government Plan to Define "Degrading Treatment" in Law to Limit Deportation Challenges' (The Justice Gap, 20 October 2020): <<https://www.thejusticegap.com/government-plan-to-define-degrading-treatment-in-law-to-limit-deportation-challenges/>>.

57 On the 'inadmissibility' of asylum applications for those who have gone through or are otherwise connected to 'third countries' designated as 'safe', see the Nationalities and Borders Act 2022, ss 15–17, and the analysis in S Tudor, *Refugees and Asylum-Seekers: | UK Policy* (1 December 2022): <<https://lordslibrary.parliament.uk/refugees-and-asylum-seekers-uk-policy/>>.

58 *NSK v the United Kingdom* 28774/22 (ECtHR, communicated case). See, further, text to n 79 below.

59 See the analysis in Public Law Project, Bonavero Institute of Human Rights, Amnesty International, Liberty, and Immigration Law Practitioners' Association (ILPA), 'The Illegal Migration Bill: Constitutional Implications' (22 May 2023): <<https://publiclawproject.org.uk/content/uploads/2023/05/The-Illegal-Migration-Bill-Constitutional-Implications.pdf>> especially 25–27.

60 See the rich analysis in Heri (n 7).

61 For a 'typology' of vulnerability and its implications in the ECtHR's Article 3 jurisprudence, see *ibid* Chapters 3, 4, and 7.

or structural discrimination, by making a finding of a violation of Article 14 alongside Article 3 ECHR.⁶²

Article 3 has, moreover, been a key basis of protection for persons in prison. The case of *Keenan v UK* offers an early example of the ECtHR's interventions in this area. Here, a young man who was serving a four-month prison sentence for assault and who evinced depressive and suicidal tendencies and other mental ill-health, was placed in segregation, a measure that is known to have debilitating consequences for persons' mental health. He committed suicide the next day. The ECtHR found that he had been subjected to inhuman and degrading treatment and punishment contrary to Article 3 ECHR.⁶³ Today, Article 3's extensive application in the prison context goes some way to reclaim the humanity of people who are all too often at best disregarded and stigmatised and at worst treated as 'human waste'.⁶⁴ It requires that persons in prison live in dignified conditions and that even those who have committed the most serious wrong-doing are given a chance at rehabilitation and a real hope of release if such rehabilitation is achieved.⁶⁵ While the principles emerging from the ECtHR and their application by domestic courts may not always reflect the most progressive standard of treatment of persons in detention,⁶⁶ they nonetheless often go significantly beyond what has been guaranteed

62 See, for example, the domestic violence cases of *Opuz* (n 13) paras 177–202; *Talpis v Italy* 41237/14 (ECtHR, 2 March 2017) paras 133–49; *Volodina* (n 13) paras 103–33; *AE* (n 13) paras 109–123. See also the Court's findings in respect of a religiously motivated attack in *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* 71156/01 (ECtHR, 3 May 2007) paras 138–42. But note the shortcomings in the ECtHR's identification of racist violence, discussed in R Rubio-Marín and M Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence Before the ECtHR and the Holocaust Prism' (2015) 26(4) *European Journal of International Law* 881.

63 *Keenan v the United Kingdom* 27229/95 (ECtHR, 3 April 2001).

64 *Léger v France* 19324/02 (ECtHR, 11 April 2006) Partly Dissenting Opinion of Judge Costa, para 13 – cited in *Murray v the Netherlands* [GC] 10511/10 (ECtHR, 26 April 2016) Partly Concurring Opinion of Judge Pinto de Albuquerque, para 21.

65 See N Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15 *Human Rights Law Review* 721.

66 Indeed, a substantive backtracking by the majority on the UK's compliance with the reducibility requirement in respect of life sentences was condemned by Judge Pinto in *Hutchinson v the United Kingdom* [GC] 57592/08 (ECtHR, 17 January 2017) Dissenting Opinion of Judge Pinto de Albuquerque. See further discussion of Article 3 ECHR's significance in the penal context in S Snacken, 'The European Court of Human Rights and National Penal Policies: Fostering Quantitative and Qualitative Penal Moderation Through Articles 3 and 5 ECHR 1', in *The Evolving Protection of Prisoners' Rights in Europe*, G Cliquenois (ed), (Routledge 2022).

under domestic law.⁶⁷ Given the demands that it makes of treating with basic humanity people who are regularly deemed undeserving of it in dominant media accounts and political rhetoric,⁶⁸ this is another area in which Article 3 ECHR has attracted considerable backlash.⁶⁹

What I have sought to illustrate above is that Article 3 can operate as a vital, non-displaceable source of protection to people who may routinely or sporadically fall through the cracks of majoritarian processes and dominant socio-political norms and practices, people who have been on the margins of society's regard, who are disenfranchised or otherwise disempowered, and whose abuse might otherwise have faced too few barriers and attracted little meaningful redress or condemnation. It is precisely where it has triggered consternation or backlash that Article 3's importance in vindicating the egalitarian character of human rights and the unconditional protection of human dignity is most evident.

4 The Hollowness of the UK Constitution's 'Equivalent' (Potential) Protections

Article 3 ECHR, as interpreted and applied by the ECtHR and by domestic courts under the HRA, offers robust legal guarantees for individuals facing (risks of) torture, inhumanity, or degradation in a variety of circumstances. In the context of the current political appeal of policies and practices which take aim at, or disregard, people deemed (implicitly or explicitly) unworthy of (certain) rights protections, the prospect of a departure from the ECHR, the repeal of the HRA, and the introduction of a novel set of legislative rights guarantees holds significant potential for the dilution or removal of protections offered by Article 3 ECHR.

67 See S Foster, 'Prison Conditions and Human Rights: The Development of Judicial Protection of Prisoners' Rights' (2009) 1 *Web Journal of Current Legal Issues*: <<http://www.bailii.org/uk/other/journals/WebJCLI/2009/issue1/foster1.html>>; S Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) Chapters 4–5; Amos (n 11) 277–281.

68 See L Gies, 'Human Rights, the British Press and the Deserving Claimant', in *The UK and European Human Rights: A Strained Relationship?*, KS Ziegler, E Wicks, and L Hodson (eds), (Hart Publishing 2015).

69 See, for example, N Watt and A Travis, 'Tory Ministers Condemn ECHR Ruling on Whole-Life Prison Sentences' (*The Guardian*, 9 July 2013): <<https://www.theguardian.com/law/2013/jul/09/whole-life-sentences-david-cameron-human-rights>>; Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Plans for Changing Britain's Human Rights Laws' (2014): <https://www.amnesty.org.uk/files/protectinghumanrightsinuk_conservativeparty.pdf?vhZrAQkxzwCH8hbjeYhhcu5B5lyPp_9K=>.

4.1 *A British Bill of Rights?*

Proposals for a British Bill of Rights have continued to surface in the political arena. While initially at least *nominally* presented as a potentially expansive undertaking to bolster rights protection in the UK,⁷⁰ the idea of such legislation has in more recent years been more explicitly tied to a rights-restricting agenda.⁷¹ Concretely, and in respect of Article 3 ECHR, such restriction or dilution has been attempted in a variety of ways. Three notable examples can be found in the Bill of Rights, put forward in 2022,⁷² the Victims and Prisoners Bill, currently making its way through Parliament,⁷³ and in the Illegal Migration Act.⁷⁴ The recent Bill of Rights Bill sought, among other things, to repeal the judicial duty under section 3 of the HRA to interpret laws compatibly with Convention rights⁷⁵ and to undermine positive obligations by preventing domestic courts from progressively applying or building on the ECtHR's positive obligations jurisprudence.⁷⁶ While the Bill of Rights has been 'shelved' for now,⁷⁷ it is clear that some of the ideas contained within it endure and (may) present themselves in new legislative initiatives. Indeed, both the Illegal Migration Act and the Victims and Prisoners Bill seek to disapply section 3 of the HRA in relation to their provisions,⁷⁸ and each of these seek to undermine concrete human rights protections, notably for persons in 'irregular' migration contexts and in prison, respectively. While the government's efforts

70 UK Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (vol 1, December 2012): <<https://webarchive.nationalarchives.gov.uk/ukgwa/20130206021312/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>>. But see M Elliott, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights' (2013) *European Human Rights Law Review* 137.

71 C Gearty, 'States of Denial: What the Search for a UK Bill of Rights Tells us About Human Rights Protection Today' (2018) 5 *European Human Rights Law Review* 415.

72 Bill of Rights Bill HC Bill (2022–23) [117]. See the critical analysis in M Elliott, 'The UK's (New) Bill of Rights' (Public Law for Everyone, 22 June 2022): <<https://publiclawforeveryone.com/2022/06/22/the-uks-new-bill-of-rights/>>.

73 Victims and Prisoners Bill HC Bill (2022–23) [286]. See the critical analysis in Liberty, 'Liberty's Briefing on the Human Rights Act and the Victims and Prisoners Bill for Second Reading in the House of Commons' (May 2023): <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2023/03/Libertys-Briefing-on-the-HRA-and-the-Victims-and-Prisoners-Bill-second-reading-HoC-May-2023.pdf>>.

74 Illegal Migration Act 2023. See the analysis in Public Law Project, Bonavero Institute of Human Rights, Amnesty International, Liberty, and ILPA (n 59) especially 25–27.

75 Bill of Rights Bill (n 72) s 1 and sch 5 para 2.

76 *Ibid* s 5.

77 See M Cross, 'Raab's Bill of Rights Bill for Final Chop' (The Law Society Gazette, 8 May 2023): <<https://www.lawgazette.co.uk/law/raabs-bill-of-rights-bill-for-final-chop/5115961.article>>.

78 Illegal Migration Act (n 74) s 1(5); Victims and Prisoners Bill (n 73) s 42–43.

to circumvent Article 3's *non-refoulement* principle through the Rwanda policy have been rebuffed by the Supreme Court,⁷⁹ the reality remains that there continues to be substantially more political appetite to dilute than to fortify Article 3's protections.

4.2 *The Mythology and Reality of the Common Law's Guarantees*

It may be tempting to speculate or hope that the common law may (be interpreted to) offer equivalent protections to Article 3 ECHR and/or fill gaps or supplement any legislative provision that might be made if the ECHR and HRA were abandoned. This would be unduly optimistic. Currently, allusions to the idea that protection from torture and ill-treatment is constitutionally embedded appear thin and shaky in comparison to the explicit protection of the right under the HRA, coupled with the wealth of principles and concrete findings that have emerged out of hundreds of ECtHR judgments on Article 3 ECHR,⁸⁰ building up a body of jurisprudence which has been treated widely as *res interpretata*.⁸¹

The idea that the right not to be subjected to torture or ill-treatment – or, at least, the *prohibition of torture* – is a central tenet of the common law is put forward often,⁸² and the House of Lords judgment in *A (No 2)*⁸³ tends to be cited as demonstrative of the prohibition's common law status. *A (No 2)* concerned the consideration by the Special Immigration Appeals Commission (SIAC) of evidence obtained through torture in a foreign state without the proven involvement of the UK government. The House of Lords found that evidence obtained by torture could not lawfully be admitted into SIAC proceedings, irrespective of who had inflicted the torture. In making this finding, the Law Lords made statements such as that 'the English common law has regarded

79 *R (on the application of AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42; [2023] 1 WLR 4433.

80 By the end of 2022, there had been over 4,000 findings of violation of Article 3 ECHR. See ECtHR, 'Violations by Article and by State 1959–2022': <https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf>.

81 On *res interpretata* and ECtHR pronouncements, see OM Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28(3) *European Journal of International Law* 819. On the significance of the ECtHR's pronouncements on Article 3 in respect of the s 2 HRA 1998 duty, see B Malkani, 'A Rights-Specific Approach to Section 2 of the Human Rights Act' (2012) *European Human Rights Law Review* 516, 519–521.

82 See, for example, E Borge, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75 *Cambridge Law Journal* 220, 222; D Friedman QC, 'Torture and the Common Law' (2006) 2 *European Human Rights Law Review* 180.

83 *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.

torture and its fruits with abhorrence for over 500 years, and that abhorrence is shared by over 140 countries which have acceded to the Torture Convention'.⁸⁴ Lord Bingham characterised the condemnation of torture as a 'constitutional principle'.⁸⁵ By majority – with Lords Bingham, Nicholls, and Hoffmann dissenting – the House of Lords decided that the standard for determining whether evidence was obtained by torture was the 'balance of probabilities', determined by such inquiry as practicable to carry out in the circumstances.⁸⁶ The Law Lords also found that the Secretary of State had not acted unlawfully in relying on such tainted material when certifying, arresting and detaining persons under the Anti-terrorism, Crime and Security Act 2001.⁸⁷

Yet, *A (No 2)* does not represent the recognition of a robust right not to be tortured or ill-treated at common law. First, many of the Law Lords in *A (No 2)* sought reinforcements by citing the UK's commitment to the prohibition at international law (notably, the UK is signatory to the United Nations Convention Against Torture⁸⁸ as well as to the International Covenant on Civil and Political Rights,⁸⁹ which prohibit torture and other cruel, inhuman or degrading treatment or punishment – these bind the UK, a dualist country, on the international plane). The notion that the common law so zealously safeguards the prohibition of torture is also blunted by the significant substantive limitations of the judgment. The executive's use of tainted evidence – as distinct from the admission of such evidence in judicial proceedings – was upheld, while the balance of probabilities test allowed the SIAC, if in doubt, to err on the side of using potentially tainted evidence.⁹⁰ Moreover, the judgment's focus on *torture* leaves room for contemplating that inhuman or degrading treatment might bear distinct, lesser implications, and opens the door for the kind of tinkering with the threshold between torture and other ill-treatment that has particularly plagued the prohibition after 9/11.⁹¹

84 Ibid [51] (Lord Bingham).

85 Ibid [12] (Lord Bingham).

86 Ibid notably [116]–[121] (Lord Hope); cf [55]–[62] (Lord Bingham).

87 See *ibid* [47] (Lord Bingham).

88 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

89 International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

90 *A and Others* (n 83) [118] (Lord Hope).

91 See, in relation to this, WB Wendel, 'The Torture Memos and the Demands of Legality' (2009) 12 *Legal Ethics* 107. See the interesting assessment of the significance of the distinction between torture and other ill-treatment in *Belhaj v Straw* [2017] UKSC 3, [2017] 2 WLR 456, [280] (Lord Sumption).

Other statements of principle in respect of the condemnation of torture have pushed towards accountability and redress for torture, as was the case in *Pinochet (No 3)*,⁹² which concerned the extradition to Spain of former dictator of Chile, Augusto Pinochet Ugarte, and the extraordinary rendition case of *Belhaj v Straw*, in which the Supreme Court found that claims against UK officials for complicity in acts of torture overseas could proceed to trial.⁹³ In *Belhaj*, it was stressed that ‘torture has long been regarded as abhorrent by English law [citing *A (No 2)*] [...] and individuals are unquestionably entitled to be free of deliberate physical mistreatment while in the custody of state authorities’.⁹⁴

As I argued in an earlier study, however, in some of the strongest common law messages of the condemnation of torture and ill-treatment, such condemnation is driven by and orientated towards reinforcing the perceived integrity of the law itself, rather than concretely safeguarding the integrity of the human beings that stand to be ill-treated.⁹⁵ *A (No 2)* is starkly illustrative of this, in that the judgment insulates the legal process from tainted evidence while at the same time preserving the executive’s power to use such evidence, thereby enabling the Government to benefit from (and arguably incentivising) abusive practices. The judgment thus reinforces the hollow purity of the common law, which ‘boasts’ that torture has traditionally been an instrument of state and not of law.⁹⁶ Question marks also remain regarding what understanding of ‘torture’ and ‘mistreatment’ might be employed by domestic courts without the (direct) influence of the ECtHR. The emphasis on *physical* mistreatment in the *Belhaj* statement, quoted above, for example, raises questions as to whether domestic courts are prepared to recognise the full scope of psychological and physical ill-treatment that has been deemed to fall within the scope of Article 3 ECHR in the ECtHR’s rich Article 3 jurisprudence.⁹⁷

There is also good reason to view the common law as lacking equivalent protections to Article 3’s positive obligations. In this regard, the Supreme Court judgment concerning the systemic failings in the police response to complaints about serial sex offender John Worboys makes for important reading. In

92 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, [1999] 2 WLR 827.

93 *Belhaj* (n 91).

94 *Ibid* [98] (Lord Mance). See also *ibid* [107] (Lord Mance).

95 N Mavronicola, ‘The Mythology and the Reality of Common Law Constitutional Rights to Bodily Integrity’ in M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020) 35.

96 E Black, ‘Torture Under English Law’ (1927) 75 *University of Pennsylvania Law Review and American Law Register* 344, 344.

97 See the discussion in Mavronicola (n 8) Chapters 4 and 5.

particular, it was key to the majority judgments that the police's exemption from liability at common law was irrelevant to claims advanced under the HRA, as the two involved distinct spheres of liability.⁹⁸ Distinguishing the common law duty of care from the relevant positive duty under Article 3 ECHR, Lord Kerr (with whom Baroness Hale agreed) indicated that:

In as much as it was considered that the common-law duty should not be adapted to harmonise with the perceived duty arising under ECHR, so should the latter duty remain free from the influence of the pre-HRA domestic law. Alternatively, it requires, at least, to be considered on its own merits, without the encumbrance of the corpus of jurisprudence under common-law.⁹⁹

The judgment confirms that common law liability, on the one hand, and ECHR positive obligations under Article 3 ECHR, on the other, operate on distinct planes, and the latter may make considerably more substantial demands of state authority action than the former.¹⁰⁰

Given all the limitations and misgivings I have identified above, it is difficult to conclude or even imagine that domestic courts would recognise common law protections which resemble the multi-faceted demands of relevant Convention rights, as elaborated in the rich jurisprudence of the ECtHR. One might still hope for the prospect that domestic courts, absent the ECHR and HRA, openly or clandestinely 'internalise' Convention rights¹⁰¹ or 'discover' that Article 3's safeguards – including its most politically contested safeguards – and other international human rights guarantees are to a large extent already part of the common law constitution.¹⁰² But such a rose-tinted vision of the common law has to rely on a glorification bordering on mythology, casting the UK as:

98 *D v Commissioner of Police of the Metropolis (Liberty and Others Intervening)* [2018] UKSC 11, [2019] AC 196, [68] (Lord Kerr).

99 Ibid. See the inverse point, to the effect that the ECHR's positive obligations do not require the expansion of common law liability, in *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] AC 225, [138] (Lord Brown).

100 See the critical analysis in J Morgan, 'Parallel Lines That Never Meet: Tort and the ECHR Again' (2018) 77 *Cambridge Law Journal* 244.

101 V Fikfak, 'English Courts and the "Internalisation" of the European Convention of Human Rights? – Between Theory and Practice' (2015) 5 *UK Supreme Court Annual Review* 188.

102 See, for example, D Friedman QC, 'A Common Law of Human Rights: History, Humanity and Dignity' (2016) 4 *European Human Rights Law Review* 378.

A land of settled government,
 A land of just and old renown,
 Where Freedom slowly broadens down
 From precedent to precedent.¹⁰³

In view of the continuums of torture and inhumanity central to the UK's past and present, this vision of the UK's ever-larger freedom clearly constitutes a 'myth of the marvellous past',¹⁰⁴ and one which neglects the historical as well as enduring imperialist dynamics of the common law's liberal rule of law and its celebration as a 'civilisational achievement'.¹⁰⁵ Crucially, such glorification requires us to interrogate 'whose freedom we are concerned with, what sort of freedom we have in mind, and which English people it is of whose virtue the common law is the legal embodiment'.¹⁰⁶ 'Whose freedom' is a vital question to ask. Today, it is chiefly the 'others' of the political community, like prisoners, asylum-seekers, 'irregular' migrants, women, persons of colour, disabled persons, people living in poverty, LGBTQIA* persons, whose bodily and mental integrity stands to be (*further*) impinged upon in a future where the right not to be subjected to torture or related ill-treatment is not as explicitly or robustly guaranteed.¹⁰⁷ Ultimately, the mythology surrounding the common law's opposition to torture stands in tension with the reality of the UK's uninterrupted history of (involvement in) torture and dehumanisation, the thin and uncertain concrete protections the UK's uncodified constitution can be seen to offer,¹⁰⁸ and the precarity of the persons that stand to benefit from them.

5 Conclusion: What is at Stake?

In ancient times across many polities, torture was inflicted regularly and almost exclusively on non-citizens, notably slaves, 'barbarians', and foreigners. In the

103 A, Lord Tennyson, 'You Ask Me, Why, Tho' Ill at Ease' (1842), cited in *A and Others* (n 83) [152] (Lord Carswell).

104 C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press 2016) Chapter 2.

105 D Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81(5) *Modern Law Review* 739.

106 Gearty (n 104) 22.

107 *Ibid* 152–160; Gies (n 68).

108 Brendan Lim describes as 'vulnerable' those rights 'which the ordinary political process may be inapt to protect' – B Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 395.

past as well as today, as Darius Rejali has observed, torture and ill-treatment operate to '[remind] lesser citizens who they are and where they belong'.¹⁰⁹ In remarks published over a decade ago but still amply relevant, Mark Elliott observed that the depletion of public and political support towards human rights in the UK is marked by 'a scepticism about the universalist nature of human rights', leading to arguments in the vein of "British rights for good British citizens", which he rightly deemed irreconcilable with any conception of universally applicable *human* rights.¹¹⁰ The recurring emergence of (variations of) a British Bill of Rights has done little to dissipate this concern. There is good reason in the current political climate to fear that the removal of the current *human* rights framework and its egalitarian underpinnings may precipitate a new approach to rights (and responsibilities) in which a criterion other than humanity is key.¹¹¹ The people whose bodily and mental integrity will (continue to) be on the line in such developments will most likely be non-citizens or 'quasi-citizens' who find themselves on the margins of public, political and judicial goodwill, or facing enduring institutional, systemic and structural discrimination. Returning to the question of 'whose freedom' is at stake here, therefore, it is vital to consider the distribution of freedom, or freedom from harm, that would emerge in a future without the HRA or ECHR, not least in view of the enduring precarity of the 'human' in human rights.

The right not to be subjected to torture or to inhuman or degrading treatment or punishment enshrined in Article 3 ECHR is not a panacea, nor has its interpretation been without flaws.¹¹² But it remains a right that provides essential protections against dehumanising policies and practices that may attract the support or indifference of significant sections of the political establishment and general public, and whose loss would be forcefully felt, not least by persons who are demonised, stigmatised, marginalised, disregarded, or otherwise 'othered' in an ever-hostile environment.

109 D Rejali, *Torture and Democracy* (Princeton University Press 2007) 58.

110 Elliott (n 70) 141.

111 A similar argument is made, in the spirit of 'dignifying' the UK rights model, in B Douglas, 'Undignified Rights: The Importance of a Basis in Dignity for the Possession of Human Rights in the United Kingdom' (2015) *Public Law* 241.

112 A (constructively) critical treatment of relevant case law is provided in the monographs outlined at n 10. See also E Cakal, 'Torture and Progress, Past and Promised: Problematising Torture's Evolving Interpretation' (2023) 19 *International Journal of Law in Context* 236.