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A WRONG TURNING: ARTICLE 3 ECHR AND PROPORTIONALITY

STEPHANIE PALMER*

THE right not to be subjected to torture or to inhuman or degrading treatment or punishment is guaranteed in absolute terms in Article 3 of the ECHR. This article imposes on a State both a negative and a positive obligation. In recent months, the House of Lords has considered cases raising both obligations pursuant to Article 3. This paper will examine first the nature of Article 3 and these obligations, second the jurisprudence of the European Court of Human Rights on the issue of State responsibility, and finally the recent decisions of the House of Lords in *R. (on the application of Adam, Limbuela and Tesema)* v. *Secretary of State for the Home Department*[1] and *R. (on the application of Munjaz)* v. *Ashworth Hospital Authority (now Mersey Care NHS Trust)*.[2] In these decisions, some of their Lordships have contended that a proportionality test should be used where positive obligations arise. This paper argues first, that different consequences should not flow from the determination of a negative or positive obligation: positive obligations are not different in kind from negative ones. Second, proportionality considerations should never be used to introduce qualifications into this absolute right.

I. THE THRESHOLD REQUIREMENT OF ARTICLE 3

Article 3 provides an absolute protection against conduct that has serious physical or psychological effects on individuals. This absolute right imposes a high threshold, thus tempering the strict approach. The ill-treatment "must attain a minimum level of severity" to fall within the scope of Article 3. In *Ireland* v. *United Kingdom*, the European Court acknowledged that there is an element of relativity in this assessment but reoriented the inquiry to the particular case and the victim in question. This concept of relativity must be used with caution as undue reliance upon it could lead to the conclusion that certain types of cruelty are

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[1] [2005] UKHL 66; [2005] 3 W.L.R. 1014.
[2] [2005] 3 W.L.R. 793.

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socially or culturally acceptable in particular contexts.[3] The Court in *Ireland* stated that the assessment of the level of severity "depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim".[4]

The high threshold requirement has been maintained through the determination of what type of treatment should be classified as torture, or inhuman or degrading treatment. Some commentators have confused this relativity requirement with proportionality considerations.[5] For example, detention conditions that may contravene Article 3 requirements in certain circumstances have been permitted owing to the demands of security or the need to protect against suicide.[6] Forcible medical treatment or force-feeding may not violate Article 3 if therapeutically justified.[7] A punishment that may be justified for a serious criminal offence could constitute inhuman treatment or punishment if imposed for a petty offence.[8] The Court is not carrying out a balancing exercise in determining whether the severity threshold has been met. By focusing on the individual case and the victim in question it is engaging in an exercise of relativity. The Court will examine the detention in context, including whether the conditions are compatible with respect for human dignity and whether the individual has been subjected to greater levels of distress or hardship than is required by the detention.[9] The relativity element does not detract from the absolute nature of Article 3, as it does not qualify the right.

Circumstances which may give rise to a breach of Article 3 are not limited. In *Pretty* v. *United Kingdom*, the Court commented that: "in light of the fundamental importance of article 3, the court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise".[10]

[3] N. Rodley, *The Treatment of Prisoners under International Law* (Oxford 1999), p. 104.
[4] *Ireland* v. *United Kingdom* (1980) 2 E.H.R.R. 25, para. [162].
[5] See J. McBride, "Proportionality and the European Convention on Human Rights" in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford 1999), at p. 28.
[6] *Kröcher and Möller* v. *Switzerland* (1982) 34 DR 35 E Comm HR.
[7] *Herczegfalvy* v. *Austria* (1992) 15 E.H.R.R. 437, para. [82]. Compare *Nevmerzhitsky* v. *Ukraine* (App. No. 54825/00) judgment 5 April 2005.
[8] F. Jacobs and R. White, *The European Convention on Human Rights*, 2nd ed. (Oxford 1996), p. 51.
[9] *Labzov* v. *Russia* (App. No 62208/00) judgment 16 June 2005, para. [42].
[10] (2002) 35 E.H.R.R. 1, paras. [32–33]. See also *D* v. *United Kingdom* (1997) 24 E.H.R.R. 423, para. [49].

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II. The Nature of the Negative and Positive Obligations

The negative obligation under Article 3 is the absolute duty to refrain from subjecting a person to torture, or to inhuman treatment or punishment. The Convention protects the individual against direct abuses of power by the State authorities. The positive obligation has been developed through the Strasbourg jurisprudence: the State has an obligation to take all reasonable steps to secure respect for those rights and freedoms to everyone within its jurisdiction as required by Article 1 ECHR. Without this "positive" aspect of State responsibility, the efficacy of the fundamental rights protection set out in Article 3 would be seriously diluted or even ineffective.[11]

The positive obligation arises in many different contexts but it can be divided into two broad categories. The first is the duty to investigate alleged violations effectively.[12] This element of the positive obligation guarantees the substantive aspect of Article 3 by providing procedural safeguards against abuses by State officials. The obligation to undertake effective investigations is also linked with the general duty of member States to "secure" Convention rights to all persons within their jurisdictions as demanded by Article 1. Even in cases where the court has been unable to determine beyond reasonable doubt whether the applicants had been ill-treated by State officials as they alleged, the Court has still found a breach of this procedural duty.[13] Second, the State has a protective or deterrent obligation requiring State authorities to protect individuals from proscribed ill-treatment emanating from State agents as well as private individuals. This duty has manifested itself in a number of different ways and the following provide some examples.

A State is unable to avoid responsibility for the action of its servants or agents.[14] In particular, a State may not avoid responsibility through claiming ignorance of its agents' misconduct even where its agents are acting *ultra vires* or contrary to instructions.[15]

[11] *Veznedaroğlu* v. *Turkey* (2001) 33 E.H.R.R. 1412, para. [32].
[12] See *e.g. Aksoy* v. *Turkey* (1997) 23 E.H.R.R. 533.
[13] See *e.g. Aksoy* v. *Turkey* para. [61] and *Assenov* v. *Bulgaria* (1998) 28 E.H.R.R. 652.
[14] *Cyprus* v. *Turkey* (1976) 4 E.H.R.R. 482 paras. [372]–[374] (E. Comm.). During military operations in Cyprus, the Turkish authorities took inadequate measures to prevent rapes by Turkish soldiers of Cypriot citizens and failed to follow up incidents with appropriate disciplinary action. Turkey was found to be responsible for inhuman treatment that breached Article 3.
[15] *Ireland* v. *United Kingdom* (1978) 2 E.H.R.R. 25. The Court declared that "under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected" (para. [159]).

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The State also has a duty to take reasonable measures to prevent foreseeable risks of torture or inhuman or degrading treatment by officials of other States or non-State actors. The acquiescence or connivance of State authorities in the ill-treatment of individuals by private parties may engage the State's responsibility.[16] In extradition and deportation cases, the Court has found that State responsibility is engaged if acts by the State have "sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction".[17] There is also a general obligation upon States to take positive measures, such as the passing of effective criminal laws, to prevent and deter serious breaches of personal integrity.[18]

The court has famously addressed this protective obligation in the context of failures by social services to provide adequate protection. In a case concerning the failure of a local authority to take steps to protect children known to be at risk of serious neglect and abuse, the European Court confirmed that States are required to take measures designed to ensure that an individual's Article 3 rights are protected even against inhuman or degrading treatment administered by private individuals.[19] Following the decision in *Osman* v. *United Kingdom*,[20] the Court concluded that these measures should include "reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge". The obligation appears to have heightened importance where children or vulnerable persons are at risk.[21] According to the Court in *E* v. *United Kingdom*, "[a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State".[22]

The type and level of protection arising under Article 3 will vary depending on the context of each particular case and the

[16] *Ilaşcu and others* v. *Moldova and Russia* (App. No 48787/99) judgment 8 July 2004, para. [318].

[17] *Ilaşcu* v. *Moldova and Russia*. See *e.g. Soering* v. *United Kingdom* paras. [88]–[91] and *D* v. *United Kingdom* (1997) 24 E.H.R.R. 423.

[18] In *A* v. *United Kingdom* (1999) 27 E.H.R.R. 611, the Court found a violation of Article 3 as the domestic criminal law had failed to protect a child who had been severely beaten by his step-father with a garden cane. Although the step-father was prosecuted, he had successfully deployed the available defence of "reasonable chastisement" to the criminal assault charge.

[19] *Z* v. *United Kingdom* (2002) 34 E.H.R.R. 3, para. [73].

[20] (1998) 29 E.H.R.R. 245. *Osman*, an Article 2 case, first identified the requirement that agencies of the State take appropriate "operational" action to satisfy their protective duty. See also *Keenan* v. *United Kingdom* (2001) 33 E.H.R.R. 913, para. [89].

[21] *Z* v. *United Kingdom*. (2002) 34 E.H.R.R. 3, para. [73].

[22] (2003) 36 E.H.R.R. 31. *E* v. *United Kingdom* is a further example of where the relevant authorities failed to act while aware of serious acts of child abuse directed against the applicants. The Court rejected the argument that would require the applicants to demonstrate that "but for" the failure to act on the part of public authorities the ill-treatment would not have happened.

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characteristics of the victim in question. As outlined above, Strasbourg's inventive doctrine of the positive obligation under Article 3 to protect people from the violation of their rights by private as well as public actors has been adapted and used in a dynamic and flexible way by the European Court.

III. Recent Decisions of the House of Lords

In *R. (on the application of Adam, Limbuela and Tesema)* v. *Secretary of State for the Home Department*,[23] the House of Lords was asked to consider the compatibility with Article 3 of section 55(1) of the Nationality and Immigration and Asylum Act 2002 which provides that the Secretary of State "may not provide or arrange for the provision of support" including food and shelter for asylum seekers if he is "not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom". The consequence of refusing support is that many asylum seekers were left in a desperate state: without food, money, washing, toilet facilities or a place to sleep. Further, asylum seekers are statutorily prevented from taking any employment. This harsh section is qualified by a legislative recognition that Convention breaches may arise. Section 55(5)(a) lifts the prohibition on assisting asylum-seekers "to the extent necessary for the purpose of avoiding a breach of a person's Convention rights", but this section closely confines the Secretary of State's action. The House of Lords concluded that depriving late applicant asylum-seekers of any support is inhuman or degrading treatment and contrary to Article 3.

In reaching this conclusion, the House commented upon the nature of the positive and negative obligations arising under Article 3. According to Lord Hope, the public authority has intentionally created and is therefore "directly responsible" for the legislative regime that has led to this real risk of destitution. "The fact that an act of a positive nature is required to prevent the treatment from attaining the *minimum* level of severity which engages the prohibition does not alter the essential nature of the article .... If the effect of what the state or the public authority is doing is to breach the prohibition [in Article 3], it has no option but to refrain from the treatment which results in the breach. This may mean that it has to do something in order to bring that about."[24] In the view of Lord Scott, Article 3 did not impose a positive obligation to provide a minimum threshold of social support for those in need,

[23] [2005] UKHL 66; [2005] 3 W.L.R. 1014.
[24] *Ibid.*, para. [47].

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but the situation was different where the State regime imposed the destitution upon the asylum seekers.[25] Baroness Hale finds that there are two situations in which the State can be responsible for a victim's suffering. "The first is when the state has itself subjected that person to such suffering. The second is when the state should have intervened to protect a person from suffering inflicted by others."[26] She concluded that these cases fell within the first category. Lord Brown found it unhelpful "to analyse obligations arising under article 3 as negative or positive and the state's conduct as active or passive",[27] although he went on to exclude those cases where special duties arise: duty to hold an effective investigation, to enact effective criminal laws and to take *appropriate* operational steps to guard against ill-treatment.[28] According to Lord Brown, with Lord Hope agreeing, the critical factor is whether the State is properly to be regarded as responsible for the conduct that is prohibited by the article.

In the Court of Appeal, Laws L.J. had pointed to an alternative way of analysing these issues. Three of the judges in the House of Lords commented on his approach in *Limbuela* in the Court of Appeal and in *R. (on the application of Gezer)* v. *Secretary of State for the Home Department*.[29] Laws L.J. had suggested the possibility of a spectrum analysis whereby in all but very extreme cases a wide range of factors should be considered before deciding whether or not Article 3 is breached.[30] At one end of the spectrum lies violence authorised by the State but unauthorised by law: such violence would always be unjustified. At the other end lie cases where government action or omissions could be justified notwithstanding the individual's suffering, unless it reaches a very high threshold.

Lord Brown found the approach of Laws L.J. helpful "because it highlights the many different considerations in play".[31] In contrast, Lord Hope expressed "a feeling of unease about this analysis".[32] He stressed that it would be wrong to conclude that the Article 3 test is more demanding where it concerns legitimate government policy: "That would be to introduce into the absolute prohibition, by the back door, considerations of proportionality. They are relevant when an obligation to do something is implied

[25] *Ibid.*, para. [66]–[67].
[26] *Ibid.*, para. [77]. See also para. [7] (per Lord Bingham).
[27] *Ibid.*, para. [92]. Lord Hope agreed with this point.
[28] *Ibid.*
[29] [2005] H.R.L.R. 7; [2004] EWCA Civ 1730.
[30] *Ibid.*, paras. [24]–[29], and *R (Limbuela)* v. *Secretary of State for the Home Department* [2004] QB 1440, para. [70].
[31] *Ibid.*, para. [89]. Lord Brown added that it was unhelpful to try and place each complaint on a spectrum.
[32] *Limbuela*, para. [53].

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into the Convention."[33] Baroness Hale also confessed to disquiet about the spectrum analysis developed by Laws L.J., as "it invites fine distinctions which have no basis in the Convention jurisprudence".[34] This rejection of the spectrum analysis is consistent with the Strasbourg jurisprudence on Article 3. Nevertheless, his approach does have the value of highlighting the relevant factors when determining the scope of a positive obligation.

The *Limbuela* decision confirms that a positive aspect of a negative obligation may give rise to a duty on the State to protect individuals against foreseeable threats of harm amounting to treatment prohibited by Article 3. Where the ill-treatment results from "the acts or omissions for which the state is directly responsible there is no escape from the negative obligation on the states to refrain from such conduct, which is absolute".[35] The alleged ill-treatment must reach the necessary degree of severity. It is up to the court to assess the severity threshold within the context of the particular case and victim in question. Once the treatment or punishment is found to be inhuman or degrading, then the conduct is prohibited and the obligation is absolute. Proportionality assessments are inappropriate. The rationale for the State's impugned action may be understandable, "but it is of the essence of the state's obligation not to subject any person to suffering which contravenes article 3 that the ends cannot justify the means".[36]

The House of Lords decision in *R. (on the application of Munjaz)* v. *Ashworth Hospital Authority (now Mersey Care NHS Trust)*[37] further addressed the distinction between a negative and a positive obligation. Their Lordships, overturning the Court of Appeal, held that a Hospital Authority is at liberty to depart from a Code of Practice issued under the Mental Health Act 1983 in relation to the seclusion of psychiatric patients as a matter of policy, if it has cogent reasons to do so.[38] The hospital's seclusion procedure departed from the Code in providing less frequent medical reviews for all long-term secluded patients. The issue before the court was the lawfulness of Ashworth's policy under domestic law and whether it was compatible with the Human Rights Act

[33] *Ibid.*, para. [55].
[34] *Ibid.*, para. [77].
[35] *Ibid.*, para. [53] (*per* Lord Hope).
[36] *Ibid.*, para. [77] (*per* Baroness Hale).
[37] [2005] UKHL 58; [2005] 3 W.L.R. 793.
[38] Seclusion for detained psychiatric patients is described in the Code of Practice as "the supervised confinement of a patient in a room, which may be locked to prevent others from significant harm". The Code was found to be more than mere advice but was not considered legislative in effect. The procedures were held to be valid under domestic law.

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1998. The reason for the challenge was that Ashworth's policy statement represents less protection of mentally disordered patients than provided for in the Code. As a consequence, there is always a risk that seclusion will violate the Article 3 guarantees. The applicant did not contend that he had been inappropriately secluded or that he had suffered any ill effect as a consequence of his seclusion. Nevertheless, seclusion is a controversial policy because of the potential physical and psychological impact on the patient as well as its potential for misuse.

Lord Hope approached the issue by asking whether the policy gave rise to a significant risk of ill-treatment prohibited by Article 3. He concluded that if full effect is given to the policy on seclusion "the risk of ill-treatment is very low" and consequently, it would be disproportionate for the Hospital Authority to be forced to abandon its policy.[39] Moreover there was no evidence that the policy had subjected patients to treatment prohibited by Article 3. In contrast, Lord Bingham found it unnecessary to consider the extent or probability of the risk or the extent to which it must be foreseen as the policy properly operated would provide sufficient protection against treatment prohibited by Article 3.[40]

Lord Steyn delivered a strong dissenting opinion. He concluded that the judgment of the House "permits a lowering of the protection offered by the law to mentally disordered patients".[41] He expressed concern that the Code, which provides a minimum standard of safeguards and centrally imposed protection, will be diluted if hospitals are free to depart from it for pragmatic reasons. He agreed with the conclusion of the Court of Appeal that given the dangers inherent in seclusion policies and the vulnerability of the patients, a general policy of departure was unacceptable.[42]

This decision was solely about the risk of a possible breach as the policy did not follow the Code and turned on domestic as well as Convention law, Articles 3, 5 and 8 ECHR. According to the majority of their Lordships, the Article 3 argument failed because the evidence indicated that, if properly implemented, the policy would not expose patients to proscribed ill-treatment. Nevertheless, the analysis of Article 3 by the majority in the House of Lords is rather surprising in some respects. First, in assessing whether the policy was compatible with Article 3, insufficient emphasis appeared to be given to the extreme vulnerability of detained mentally ill patients. The Strasbourg jurisprudence stresses that careful

[39] *Ibid.*, para. [82].
[40] *Ibid.*, para. [29].
[41] *Ibid.*, para. [48].
[42] *Ibid.*, para. [46].

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consideration, indeed heightened scrutiny, must be given to such vulnerable individuals.[43] Second, the fact that there was no evidence of physical or psychological damage to the patients is not necessarily a deciding factor. Treatment of a mentally ill individual may still violate Article 3 standards, "even though the person may not be capable of pointing to any specific ill-effects".[44]

Third, Lord Hope commented upon the nature of the positive obligation: "while the absolute prohibition is not capable of modification on grounds of proportionality, issues of proportionality will arise where a positive obligation is implied as where positive obligations arise they are not absolute".[45] This comment indicates a flawed understanding of the nature of the positive obligation and the absolute character of Article 3. His Lordship seems to lay stress on the implied nature of positive obligations, as compared to the presumably express nature of negative obligations. Article 3 focuses on the potential victim: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". It does not follow that different consequences should flow from the determination of a negative or positive obligation as the critical issue is whether the State should take responsibility for the ill-treatment. If a positive obligation arises under Article 3, it is an absolute right. Finally, the majority of their Lordships did not specifically address the issue of proportionality and positive obligations, leaving some uncertainty. For this reason, Lord Hope's approach and his comments on proportionality deserve closer analysis.

IV. Positive Obligations and the Issue of Proportionality

Lord Hope in the *Limbuela* case stated that proportionality is relevant when "an obligation to do something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified."[46] What is meant by Lord Hope's statement? On the one hand, he may be proposing that proportionality is relevant to the interpretation of Article 3 when a positive obligation is engaged. On the other hand, he may be suggesting that proportionality is relevant to determining the scope of the positive obligation.

[43] See *e.g. Z* v. *United Kingdom*; *Keenan* v. *United Kingdom* (2001) 33 E.H.R.R. 913, para. [110]; and *Herczegfalvy* v. *Austria* (1992) 15 E.H.R.R. 437, para. [82].
[44] *Keenan* v. *United Kingdom* (2001) 33 E.H.R.R. 913, para. [112].
[45] *Ibid.*, para. [78].
[46] *Limbuela*, para. [55]. See also *R.* v. *Ashworth Hospital Authority ex parte Munjaz* [2005] 3 W.L.R. 793, para. [78].

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V. Proportionality and the Interpretation of Article 3

The test of proportionality is a means to conduct a balancing exercise.[47] The European Court has applied different variants of the proportionality principle in different contexts.[48] A more "flexible version" is adopted when considering rights to property[49] or whether the discrimination guarantee has been violated.[50] When a qualified right is at stake (Articles 8–11), the test is applied in a stricter manner. Proportionality is assessed by balancing the importance of the interference against the seriousness of interfering with a fundamental right. This is done within the context of the legitimate aim: is the extent of the restriction greater than is reasonably necessary to achieve the legitimate aim? Proportionality in these contexts is linked to the stipulation that restriction must be "necessary in a democratic society". More recently, when considering the scope of the positive obligation under Article 8, the Grand Chamber in *Hatton* v. *United Kingdom*, noted that whether the case is analysed as a positive duty on the State to secure the applicant's rights under Article 8(1) or as an interference to be justified in accordance with Article 8(2), "the applicable principles are broadly similar .... [E]ven in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of certain relevance".[51] The application of proportionality is easier to understand in the context of qualified rights, as opposed to absolute rights, as the former contain express provision for their limitation.

As Article 3 is an unqualified right, how then can proportionality be relevant? There is some guidance from the Strasbourg jurisprudence on this point. The European Court appeared to adopt a balancing test in *Soering* v. *United Kingdom*.[52] This case concerned the extradition of the applicant to the State of Virginia in the USA. He was accused of murder and if found guilty was likely to face the death penalty. The European Court found that the return of the applicant to face the death penalty could violate Article 3 because of the conditions in detention on "death row" and his personal circumstances. The basis of the decision is

[47] See P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague 1998), pp. 80–2.
[48] Van Dijk and Van Hoof, *op. cit*., p. 81. See also R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford 2000), pp. 279–84.
[49] *Sporrong and Lönnroth* v. *Sweden* (1982) 5 E.H.R.R. 35; *James* v. *United Kingdom* (1986) 8 E.H.R.R. 123.
[50] *Inze* v. *Austria* (1987) 10 E.H.R.R. 394. See Van Dijk and Van Hoof, *op. cit.,* p. 81. See also Clayton and Tomlinson, *op. cit*., pp. 279–84.
[51] [2003] 37 E.H.R.R. 28, para. [98].
[52] (1989) 11 E.H.R.R. 439.

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that an extraditing State would be taking action that directly exposed the individual to proscribed ill-treatment.[53] In its judgment, the Court noted that the danger for a State obliged "to harbour" a fugitive was a matter which must "be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases".[54]

In the later case of *Chahal* v. *United Kingdom*, the European Court expressly stated that it should not be inferred from the Court's remarks in *Soering* that "there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged".[55] The UK government was attempting to deport Chahal to India on the ground that he was a threat to national security; but if returned to India, Chahal would be at risk of being subjected to ill-treatment contrary to Article 3. The court reasoned that even the terrorist activities of Chahal could not be a material consideration to be balanced against the risk of ill-treatment. The Court declined to consider the UK government's claims of the national security threat.[56] Thus the European Court is refusing to balance the right guaranteed by Article 3 against the reasons for the interference, even when those reasons raise legitimate concerns such as national security and the threat of terrorism. The Court has rejected any suggestion that there are implied limitations to the rights guaranteed by Article 3.[57]

Lord Hope's comment that where positive obligations arise they are not absolute[58] is rather misleading, or even confusing. The scope of the positive obligation is limited by what can be reasonably expected of the State in the circumstances. Nevertheless, this does not affect the absolute nature of the Article 3 right. Two consequences flow from its absolute nature. First it is impossible for governments to derogate, even in times of war or other "public emergency", from this right.[59] Second, the absolute terms of the guarantee prohibits any qualifying conditions under which restrictions may be legitimately imposed. Thus once it has been decided that a positive obligation arises and the severity threshold has been met, Article 3 applies and the State or public authority cannot justify interfering with this absolute right.

[53] *Ibid.*, para. [91].
[54] *Ibid.*, para. [89].
[55] (1997) 23 E.H.R.R. 413 para. [81].
[56] *Ibid.*, paras. [80] and [82].
[57] See also Clayton and Tomlinson, *op. cit.*, p. 319.
[58] *Munjaz*, para. [181].
[59] Article 15(2) ECHR.

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Lord Hope's proportionality approach does have the potential to undermine the absolute and unqualified protection guaranteed by Article 3. Any reason for an interference with an Article 3 right cannot be justified through a proportionality test. The question turns on whether the authorities have provided practical and effective protection of rights, as the right to be free from torture or degrading treatment or punishment is absolute. The possibility of ill-treatment takes priority even over other important considerations. Lord Hope's reasoning in *Munjaz* appeared to balance the Article 3 protection against the reasons for the hospital's policy, concluding that "it would be disproportionate for Ashworth to be compelled to abandon the Policy in favour of the Code to eliminate [the low risk of ill-treatment]". According to the European Court's jurisprudence a balancing approach is unacceptable.[60]

VI. Proportionality and the Scope of the Positive Obligation

Determining the scope of the positive obligation requires rational assessment of competing interests and objectives. The State, or in the domestic sphere a public authority, will not have an implied responsibility for every act of ill-treatment suffered by an individual. In the context of the positive obligation in Article 3, public authorities have a duty or obligation to take *reasonable* steps in the specific circumstances to protect against proscribed treatment of which the authorities had or ought to have had knowledge.[61] The State has a positive obligation to protect individuals against threats of torture or inhuman or degrading treatment or punishment by State agencies or others, including private individuals. In effect, the State will only incur responsibility if it has failed to act with due diligence. The duty on the State is limited by what can be reasonably expected of the State in the circumstances.

As outlined above, this positive duty arises in a number of different contexts and the content of the duty varies within each one. There is certainly room for disagreement over how far the scope of the positive duty should extend.[62] The approach of the European Court in *Osman* v. *United Kingdom*,[63] concerning the alleged failure of the authorities to protect the right to life of the applicants, was to recognise that preventative operational obligations "must be interpreted in a way that does not impose an

[60] *Chahal* v. *United Kingdom* (1997) 23 E.H.R.R. 413.
[61] *Z* v. *United Kingdom* (2001) 34 E.H.R.R. 97, para. [73].
[62] See *e.g.*, *N* v. *Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 W.L.R. 1124.
[63] (1998) 29 E.H.R.R. 245

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impossible or disproportionate burden on the authorities".[64] The Court will take into account factors such as operational choices and resource implications in determining the extent of the positive obligation. In this type of case, the Court will be taking into account the interests of the community when assessing the extent of the positive duty.

Osman is the leading case where the threat to Article 3 rights stems from the actions of private individuals. The situation must be different where an individual is treated in a State institution, such as a Mental Health hospital, and the complaint concerns the policy administered by that public body. In circumstances such as those in *Munjaz*, where it is the State that has deprived a vulnerable individual of liberty, it is incumbent upon the State to provide the patient with practical and effective protection from inhuman or degrading treatment by the State's own agents. It makes no sense to apply the *Osman* test where a State institution has the responsibility for treating an individual.[65] The issue of lack of foreseeability does not arise: when an individual is in the custody of the State, State authorities have a pre-existing and special responsibility for that individual's welfare.

Although the court has to decide the scope of the positive obligation, which will turn on the particular circumstances of each case, this is not a proportionality test. Showing that the authorities did not take all reasonable measures to make the necessary protection available is not an application of the classic proportionality test. Thus proportionality should not be relevant to determining the scope of the positive obligation.

VII. Conclusion

The European Court of Human Rights has never permitted any ill-treatment that would fall within the scope of Article 3, even for the most pressing reasons of public interest[66] and irrespective of the victim's conduct.[67] The unconditional wording of Article 3 renders the motivation for the alleged treatment irrelevant: the ends can never justify the means. This strict approach is mitigated by the severity threshold that must be satisfied under Article 3. An applicant must also establish that the ill-treatment engages the responsibility of the State.

[64] *Ibid.*, para. [116].
[65] See *R. (on the application of Munjaz)* v. *Mersey Care NHS Trust* [2004] Q.B. 395 (Court of Appeal), *per* Hale L.J., para. [58].
[66] *Chahal* v. *United Kingdom* (1997) 23 E.H.R.R. 413 and *Aksoy* v. *Turkey* (1996) 23 E.H.R.R. 553.
[67] *Ireland* v. *United Kingdom* (1978) 2 E.H.R.R. 25, para. [162].

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Introducing a proportionality test threatens to undermine the absolute nature of the Article 3 protection as it will permit justifications for ill-treatment. The consequence of the *Munjaz* decision is that each hospital can depart from the Code of Practice drawn up by experts in the field of mental health, provided they have some "cogent" reason to do so. The purpose of the Code is to set minimum standards across all the hospitals. Given the well-documented dangers with segregation, surely those individuals secluded for a longer period of time should be given, at least, the minimum number of reviews set by the Code of Practice. The consequence of this decision is that there may be a myriad of different policies applying in hospitals across the UK. The adoption of a balancing approach has led to a diminution of the protection of secluded patients in spite of the heightened scrutiny that should be given to vulnerable individuals.

The consequences flowing from the finding of a negative or positive obligation should not be different. If State responsibility is engaged, it is irrelevant whether it is through a positive or negative obligation. In the context of a positive obligation, public authorities have a duty or obligation to take reasonable steps in the specific circumstances to protect against proscribed treatment of which the authorities had or ought to have had knowledge. This is not a proportionality test. The finding in the *Limbuela* case that that there can exist a positive aspect to a negative obligation has further blurred the distinction between the two types of obligation. Positive obligations are not different in kind from negative ones. If State responsibility is engaged the same question is asked in both cases: what must the State do to avoid infringing these rights?

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